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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, ET AL.,

Appellants,

—v.—

JUDITH JAVA, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT FILED AUGUST 7, 1970
PROBABLE JURISDICTION NOTED OCTOBER 26, 1970

JUDITH JAVA ET AL. VS. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL.

DATE 1969		PROCEEDINGS
Nov.	10	1. Filed Complaint. Iss. 3 Orig. Summons'
	10	2. Filed Ord. for private process service (James M. Klein) (Clerk)
	10	3. Filed pltfs. brief in support of mo. for prelim. inj.
	10	4. Filed pltfs. notice of mo. for prelim. inj. (un-noticed)
	10	5. Filed pltfs. brief in support of mo. for tro.
	10	6. Filed pltfs. notice of mo. for tro. (un-noticed)
	10	7. Filed pltfs. affidavit in support of mo. for tro. & prelim. inj. (Judith Java)
	10	8. Filed pltfs. affidavit in support of mo. for tro. & prelim. inj. (Ralph Warn)
	10	9. Filed pltfs. affidavit (Carroll H. Hudson) in support of mo. for tro. & prem. inj.
	12	Ord. application for tro. denied. (Wollenberg)
	12	10. Filed summons on ret., exec. as to Ramon L. Jimenez, 11-10-69.
	12	11. Filed summons on ret., exec. as to Esther Perry, 11-12-69.
	12	12. Filed summons on ret., exec. as to Asher Rubin, 11-10-69.
	17	13. Filed notification & cert. to Judge Chambers requesting three judge court. (Wollenberg)
	19	14. Filed pltfs. amendment to complaint.
	21	15. Filed ord. designating three judge court, Judges Jertberg, Wollenberg & Zirpoli.
Dec.	4	16. Filed summons on ret., exec. 11-26-69.
	5	17. Filed defts. ans. to complaint.
	5	18. Filed defts. mo. to dismiss complaint
	22	19. Filed defts. ans. to interrogs.

DATE 1970		PROCEEDINGS
Jan.	8	Clerk's notice of 3 Judge Court hrg. on defts. mo. to dismiss, March 20, 1970 at 1:30 P.M. in Courtroom No. 7. (TJW)
Mar.	4	20. Filed defts. notice of taking depos. of Judith Java.
	3	19A. Filed pltfs. brief in oppos. to defts. mo. to dismiss & pltfs. brief in reply to defts. ans.
	9	21. Filed affidavit of James M. Klein.
	18	Issued summons.
	20	Ord. aft. hrg., defts. mo. to dismiss submitted. (Wollenberg)
	27	21-A. Filed Civil Subp. return executed as to JoAnn Cohn on Mar. 18-70
Apr.	14	22. Filed stip. re payment of unemployment compensation.
May	13	23. Filed Deposition of Judith Hanet Jones Java, March 16, 1970
	14	24. Filed order granting mo. for Preliminary Injunction, Execution of this order stayed 10 days from filing or upon proper mo. & showing by defense. (Judges Jertberg, Zirpoli & Wollenberg)
Jun.	12	25. Filed notice of Appeal to the Supreme Court of the U.S. by Defts.
	16	Mailed Clerk's notice of filing appeal
	24	26. Filed letter from Deputy Attorney General Asher Rubin "stating that Reporter's Transcript will be necessary for the Appeal"
	25	Made, mailed Record on Appeal to U.S. Supreme Court by Certified Mail. Receipt No. 224358
	29	27. Filed Receipt of Record on Appeal from 9th CCA
July	14	28. Filed Receipt of Record on Appeal from Clerk, Supreme Court US
	31	29. Filed Affidavit of Nicolo Pino

DATE 1970		PROCEEDINGS
Aug.	5	Made, Mailed 1st Supplemental Record on Appeal to U.S. Supreme Court by Certified Mail. Receipt No. 224355
	11	30. Filed Receipt of Suppl. Record Dated Aug. 7-70
Sept.	18	31. Filed Letter from Stephen Berzon, Notice of change of address

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Filed Nov. 10 1969.

United States District Court
Northern District of California

Civil Action Civil Rights No. C-69 350

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development; Esther Perry, as Manager of the Pittsburg, California branch of the California Department of Human Resources Development; Ramon L. Jimenez as Manager of the Richmond, California branch of the California Department of Human Resources Development,
Defendants,

COMPLAINT FOR THREE JUDGE COURT, DECLARATORY RELIEF AND INJUNCTION

I.

This is a civil action for injunctive and declaratory relief authorized by Title 42 USC 1983, Title 42 USC 501 et seq.,

and Title 28 USC 2201 and 2202 to secure rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution and by the Social Security Act, 42 USC 503 (a) (1) and (3). This action seeks to declare Section 1335 of the California Unemployment Insurance Code Unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and to declare section 1335 of the California Unemployment Insurance Code to be in violation of Sections 503 (a) (1) and 503 (a) (3) of the Social Security Act, 42 USC 503 (a) (1) and (3). This action further seeks to enjoin the enforcement of Section 1335 of the California Unemployment Insurance Code against plaintiffs and the class they represent.

II.

This is a proper case for determination by a three judge court pursuant to 28 USC 2281 since it seeks an injunction to restrain the defendant officers of the State of California from the enforcement, operation, and execution of section 1335 of the California Unemployment Insurance Code on the ground of the unconstitutionality of said statute under the Constitution of the United States.

III.

Jurisdiction is conferred on this Court by 28 USC 1343 (3) and (4) providing for original jurisdiction of this Court in suits authorized by 42 USC 1983; jurisdiction is further conferred on this Court by 28 USC 2201 and 2202 relating to declaratory judgments, and by 28 USC 2281 and 2284 providing for a three judge court. Jurisdiction is also invoked under the Fourteenth Amendment to the United States Constitution and Title 42 USC 501 et seq.

IV.

Plaintiff Judith Java is a citizen of the United States and a resident of Pittsburg, California. She is the mother and sole custodian of three school age children, all residing with and dependent upon her.

V.

Plaintiff Carroll H. Hudson is a citizen of the United States and a resident of San Pablo, California. She is the mother of one pre-school age child, residing with and dependent upon her.

VI.

Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all persons similarly situated. The class is composed of all present and future unemployed workers who have registered for employment referral with the California Department of Human Resources Development and have been granted unemployment insurance payments therefrom, and who have then suffered a termination of said payments solely because of the requirement imposed by Section 1335 of the California Unemployment Insurance Code. The members of this class are so numerous as to make joinder impracticable; there are questions of law and fact common to the class; the claim of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. Moreover, the parties opposing the class have acted, or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

VII.

Defendant Gilbert Sheffield, is the Director of the California Department of Human Resources Development. Under Section 301 and 304 of the California Unemployment Insurance Code, he is responsible for the management of the California Department of Human Resources Development and the implementation of the laws pertaining to the administration of the California Unemployment Insurance Compensation scheme. Section 1253 of the California Unemployment Insurance Code empowers the Director to determine the eligibility of an unemployed individual to receive payments with respect to any week for which a claim is filed. Section 306 of the California Unemployment Insurance Code further authorizes the director to formulate, adopt, amend or repeal such regulations as are reasonably necessary to enforce the provisions of the Unemployment Insurance Code.

VIII.

On October 31, 1969, defendant California Department of Human Resources Development, hereinafter referred to as "the Department," succeeded to and was vested with the jurisdiction heretofore exercised by the California Department of Employment pursuant to the provisions of California Unemployment Insurance Code Section 301 and California Statutes 1968, chapter 1460 Section 15. Said Department is the instrument for carrying into effect the California Unemployment Insurance system.

IX.

Defendant Esther Perry is the manager of the Pittsburg, California branch office of the Department of Human Resources Development. Defendant Ramon L. Jimenez is the

manager of the Richmond, California branch office of said Department. Said branch offices are responsible for the administration of the California Unemployment Insurance system in Pittsburg and Richmond, California, respectively.

X.

In order to receive federal funds for the Unemployment Insurance Program in the State of California, defendants (and their predecessors in office) have been required by the provisions of 42 USC 501 et seq. to have formulated a "state plan" for unemployment insurance consistent with the provisions of the Constitution of the United States and the provisions of 42 USC 501 et seq.

XI.

42 USC 503 provides in relevant part:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for (1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation when due; . . . (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; . . .

XII.

On September 4, 1969, plaintiff Judith Java was declared eligible for unemployment insurance benefits by the Pittsburg office of the Department and the payment of such benefits commenced. Her former employer, the Pittsburg *Post Dispatch* filed a notice of appeal of the decision

by the Department in her favor, and on September 10, 1969, she was informed by the Department that payment of her unemployment insurance benefits would be suspended pending the hearing and decision of the appeal. Plaintiff Java has received no unemployment insurance benefits since on or about September 5, 1969, although she has been determined by the Department to be eligible for benefits and has been unemployed continuously throughout this time.

XIII.

In August 1969, plaintiff Carroll H. Hudson was declared eligible for unemployment insurance benefits by the Richmond office of the Department and the payments of such benefits commenced. Her former employer, Payless Drug Stores, Inc. filed a notice of appeal of the decision by the Department in her favor, and on September 8, 1969, she was informed by the Department that payment of her unemployment insurance benefits would be suspended pending the hearing and decision of the appeal. Plaintiff Hudson has received no unemployment insurance benefits since on or about September 8, 1969 although she has been determined by the Department to be eligible for benefits and has been unemployed continuously throughout this time.

XIV.

The suspension of plaintiffs' benefits is due solely to Section 1335 of the California Unemployment Insurance Code which provides in relevant part:

> If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision . . . .

Under Section 1335, an unemployed worker who has been determined to be eligible by the Department for unemployment insurance benefits, and who has begun receiving such benefits, automatically stops receiving such benefits in the event that a former employer files an appeal from the decision by the Department in the employee's favor. Payment of the employee's benefits is stayed while the appeal is decided—a period that often lasts several months.

XV.

Since the suspension of plaintiff Java's unemployment insurance benefits by the Department, she has suffered severe financial injury. Her weekly indemnity from the Department was her sole source of income, except for child support payments made to her by her former husband and the father of her children. Plaintiff Java has three small children to support, of whom she has sole custody under the provisions of a divorce decree. In addition to the normal expenses of a family of four, plaintiff Java must pay for child care while working or seeking work. She has been financially unable to make adequate provision for her family, and is in imminent danger of suffering the repossession of her automobile by a finance company as a result of the suspension of her unemployment insurance payments. She has been compelled to seek public assistance from the Contra Costa County Welfare Department. The amount of financial aid received therefrom does not equal the amount she would otherwise receive from unemployment insurance. As a result, she can not pay for child care and is thereby impeded in her attempts to secure new employment. If her lack of funds results in the repossession of her automobile, she will be further limited in her efforts to seek work. Nonetheless, plaintiff Java has continued to seek employment, to the best of her ability.

XVI.

As a result of the suspension of plaintiff Hudson's unemployment insurance benefits by the Department, she has suffered severe financial hardship. Plaintiff Hudson's husband is undergoing outpatient treatment for mental illness, leaving her as sole support of her infant daughter. She presently is threatened with suit by her creditors, and unless relief is granted, she will be unable to redeem her interest in her automobile which was recently repossessed. She has been financially unable to adequately provide for herself and her child, and has been compelled to seek public assistance from the Contra Costa County Welfare Department since the payments of her benefits were suspended. Since the amount of rent she pays is twice the amount allowed under her welfare budget, she will be compelled to give up her present residence. The amount of her welfare grant is over $100.00 less than the amount of her unemployment benefits per month. As a result, she is unable to pay for child care while seeking employment. Moreover, she is unable to pay for adequate transportation, and has thereby been impeded in her efforts to seek and secure employment. Nonetheless, plaintiff Hudson has continued to seek employment to the best of her ability.

XVII.

By enacting and adopting Section 1335 of the California Unemployment Insurance Code, and by the enforcement thereof, in suspending the payment of unemployment insurance benefits to plaintiffs Java, Hudson, and all other members of their class, defendants, acting under color of State law, have unlawfully deprived plaintiffs Java and Hudson and the other members of their class of unemployment insurance benefits, and their constitutional rights to due process of law and equal protection of the law, and

their rights under 42 USC 501 et seq. in the following manner;

A. Defendants have deprived plaintiffs and their class of due process of law by arbitrarily suspending the payment of unemployment insurance benefits, for which they have previously been ruled entitled by the defendant Department itself, without a prior hearing and a decision adverse to the plaintiffs.

B. Defendants have deprived plaintiffs and their class of due process of law by arbitrarily suspending the payment of unemployment insurance benefits, for which they have previously been ruled entitled by the defendant Department itself, solely because of an appeal by the employer of the Department's initial decision and the mere possibility that the defendant's initial determination might not be upheld.

C. Defendants have deprived plaintiffs and their class of equal protection of the law by irrationally setting up different procedures for employees and employers with regard to appeals of Departmental unemployment insurance eligibility determinations. Employers are afforded a hearing prior to charging their accounts in the event of an employee's appeal of an initial determination that the employee is ineligible for unemployment insurance benefits. But employees are not afforded a hearing prior to the suspension of their benefits when an employer appeals from an initial determination that the employee is entitled to benefits.

D. Defendants, through Section 1335, have deprived plaintiffs and their class of unemployment insurance benefits to which they are entitled under the provisions of 42 USC 503 (a) (1) which "insure full payment of unemployment compensation when due."

E. Defendants, through Section 1335, have deprived plaintiffs and their class of their right under 42 USC 503 (a) (3) to a "fair hearing" before the denial of their unemployment insurance benefits.

XVIII.

Plaintiffs and the class they represent have suffered damage to their well-being and that of their families, and will continue to suffer severe and irreparable injury because of section 1335 of the California Unemployment Insurance Code until said statute is declared illegal and unconstitutional and is enjoined by this Court. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

Wherefore, plaintiffs on behalf of themselves and all others similarly situated respectfully pray that this Court:

1. Convene a three-judge court to determine this controversy pursuant to 28 USC 2281;

2. Enter an order that this action shall be maintained as a class action;

3. Issue a temporary restraining order restraining defendants, their successors in office, agents, and employees from failing to immediately restore to plaintiffs Judith Java and Carroll H. Hudson all unemployment insurance benefits that have been suspended, withheld or terminated pursuant to Section 1335 of the California Unemployment Insurance Code;

4. Issue a preliminary and permanent injunction:

(a) Enjoining defendants, their successors in office, agents and employees: From enforcing that part of Section 1335 of the California Unemployment Insurance Code which provides: "(I)f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision;" and from suspending

or terminating unemployment insurance benefits to plaintiffs and the class they represent on the ground that an eligibility determination has been appealed by an employer;

(b) Ordering the defendants, their successors in office, agents, and employees to immediately restore to plaintiffs and their class all unemployment insurance benefits that have been suspended, withheld or terminated, pursuant to Section 1335 of the California Unemployment Insurance Code.

5. Enter a declaratory judgment pursuant to 28 USC 2201, declaring the aforementioned provision of Section 1335 of the California Unemployment Insurance Code unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;

6. Enter a declaratory judgment pursuant to 28 USC 2201 declaring the aforementioned provision of Section 1335 of the California Unemployment Insurance Code in violation of Sections 501 (a) (1) and 501 (a) (3) of Title 42 of the United States Code.

7. Allow plaintiffs their costs herein, and grant such other and further relief as may appear to the Court to be equitable, just, and proper.

Dated: November 10, 1969.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: /s/ STEPHEN P. BERZON
Stephen P. Berzon

Dated: November 10, 1969

/s/ JOHN DIAZ COKER
John Diaz Coker

Dated: November 10, 1969

/s/ JAMES M. KLEIN
James M. Klein

VERIFICATION

I, the undersigned, say:

I am the plaintiff in the above-entitled matter; the foregoing document is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

Executed on November 5, 1969, at Pittsburg, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JUDITH JAVA
Judith Java
Plaintiff

VERIFICATION

I, the undersigned, say:

I am the plaintiff in the above entitled matter; the foregoing document is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters I believe it to be true.

Executed on November 10, 1969, at San Pablo, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ CARROLL H. HUDSON
Carroll H. Hudson
Plaintiff

Eugene M. Swann
Stephen P. Berzon
John Diaz Coker
James M. Klein
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Filed Nov 10, 1969

United States District Court
Northern District of California

Civil Action No. C-69 350ACW

JUDITH JAVA and CARROLL H. HUDSON, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

AMENDMENT TO COMPLAINT

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, plaintiffs are amending the original pleadings which had been filed with the Court on November 10, 1969. The amendments are as follows:

1. The caption is amended to read:

JUDITH JAVA and CARROLL H. HUDSON, individually, on behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT; GILBERT SHEFFIELD, individually, and as Director of the California Department of Human Resources Development,

Defendants.

2. At page 3, line 14 of the original complaint the following sentence is inserted: "Defendant Sheffield is sued both individually and in his official capacity".

3. Paragraph IX of the original complaint is deleted.

Dated: November ...., 1969.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: JAMES M. KLEIN /s/
James M. Klein
Attorney for Plaintiffs

Eugene M. Swann
Stephen P. Berzon
John Diaz Coker
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431 Sixth Street
Richmond, California
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United States District Court
Northern District of California

NO. .....

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

MOTION FOR A PRELIMINARY INJUNCTION

Upon the verified complaint filed in this case and the affidavits and attached exhibits filed in support of this motion, plaintiffs move this honorable court for a preliminary injunction.

(a) Enjoining defendants, their successors in office, agents, and employees from enforcing that part of Section 1335 of the California Unemployment Insurance Code which provides: "If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision and from suspending or terminating unemployment insurance benefits to plain-

tiffs and the class they represent on the ground that an eligibility determination has been appealed by an employer.

(b) Ordering defendants to immediately restore to plaintiffs and the class they represent all unemployment insurance benefits that have been suspended, withheld, or terminated, pursuant to Section 1335 of the California Employment Insurance Code.

Plaintiffs further pray that this court will allow their costs, and grant such other and further relief as may be equitable, just, and proper.

Respectfully submitted,

CONTRA COSTA LEGAL SERVICES FOUNDATION

Stephen P. Berzon
John Diaz Coker
James M. Klein

By:

Attorneys for Plaintiff

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United States District Court
Northern District of California

No. C-69 350

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

This case deals primarily with the procedural rights to be afforded claimants for unemployment compensation benefits, *not* with whether a particular claimant is eligible to receive such benefits. As the Fifth Circuit stated in *Hornsby v. Allen*, 326 F.2d 605, 612 (5th Cir. 1964):

> The proper question to be determined upon the hearing of this case in the district court is not whether plaintiff below is entitled under the law to a liquor license. The determination of whether she should be

granted one is a function of the Aldermanic Board. The role of the courts is to ascertain whether the manner in which this determination was or is made accords with constitutional standards of due process and equal protection.

Defendant California Department of Human Resources Development [hereinafter "Department"] initially determined that plaintiffs were eligible for unemployment compensation benefits. Shortly thereafter, plaintiffs' respective employers filed appeals contesting the initial determination of the Department in the plaintiffs' favor. Pursuant to Section 1335 of the California Unemployment Insurance Code [hereinafter "Code"], and as a direct result of the appeals filed by the employers, plaintiffs' benefits were stayed, pending the outcome of the appeals hearing.

Plaintiffs submit that Section 1335 of the California Unemployment Insurance Code is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; moreover, plaintiffs submit that Section 1335 is in violation of Sections 503 (a)(1) and 503 (a)(3) of the Social Security Act of 1935, as amended, 42 U.S.C. sections 503 (a)(1) and (3). Accordingly, plaintiffs seek to enjoin the enforcement of Section 1335 against them and the class that they represent.

II. SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS IN DIRECT CONTRAVENTION OF THE CONTROLLING FEDERAL STATUTES

A. *Section 503(a)(1) of the Social Security Act of 1935*

State unemployment insurance[1] is authorized and controlled by the federal Unemployment Compensation Acts [hereinafter "Act"] which are included in the Social Security Act of 1935. 42 U.S.C. sections 501-503, 1101 *et seq.* *See also* Federal Unemployment Tax Act, 26 U.S.C. sections 3301-3309. Section 503(a)(1) of the Act provides in part:

> (a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

---

1. In order to be eligible for state unemployment compensation a claimant is required to have worked a specified amount of time, or to have earned a specified amount of wages prior to becoming unemployed. *See California Unemployment Insurance Code* [hereinafter "Code"] sections 1251-1263. The benefits available to the eligible claimants come from the Unemployment Fund, which consists of funds collected from employers, interest and earnings thereon, property acquired from the use of the funds collected, and all money credited to the state's account in the Unemployment Trust Fund pursuant to Section 903 of the Social Security Act. Code section 1521 (1969 Supp.). The actual contribution owing from each employer depends upon the wages paid out to his employees. *See* Code sections 976 *et seq.* (1969 Supp.). While unemployment funds are collected directly from employers, the burden is borne indirectly by his employees. Employment compensation contributions are, of course, part of an employer's total labor cost and are reflected in the wages he is able to pay his employees. See, Note, 73, *Yale L.J.* 357, 361 (1963).

(1) Such methods of administration . . . as are found by the Secretary of Labor to be *reasonably calculated to insure full payment of unemployment compensation when due.*[2] (Emphasis added)

Plaintiffs contend that the procedures authorized by Section 1335 are not "reasonably calculated to insure full payment of unemployment compensation when due." This becomes more evident when the purposes of the Act, as evidenced by the legislative history, are surveyed.

There are three essential purposes which underlie the federal act: To stabilize consumer demand and business in the crucial incipient stages of an economic depression; to provide compensation for a short period of time while the unemployed worker can seek reemployment; and to prevent the worker from having to resort to public assistance such as welfare. *S.Rep.No.* 628, 74th Cong., 1st Sess. 10-13 (1935) [hereinafter *S.Rep.*]; *H.R.Rep.No.* 615, 74th Cong., 1st Sess. 7-9 (1935) [hereinafter *H.Rep.*]

Congress recognized the value of unemployment compensation to the public. It was viewed as a "measure intending to maintain purchasing power, upon which business and

2. The Social Security Act and the Federal Unemployment Tax Act sets forth certain tax and fiscal benefits which flow from state participation in the federal program. These benefits are conditioned upon conformity by state laws and administration with certain federal standards which are embodied in 42 U.S.C. sections 501-503, 1101 *et seq.* and in the Tax Act. To the extent these standards embody the fundamental community values underlying the federal compensation program, states whose laws contravene those values face the loss of the substantial benefits of participation. *See* Note 73 *Yale L.J.* 357, 358 (1963). In the fiscal year ending June, 1963, California's participation in the program entitled the state to $47,000,000 in grants from the federal government for reimbursement of the state's administrative costs, and entitled the state's employers to $320,544,000 credit against the federal tax on employers. *Id.* at n.8.

industry are dependent." *H. Rep.* at 8. Unemployed workers who receive no compensation are to a great extent inhibited from spending money on consumer goods. The effect of this decline in consumption is a decrease in production by business firms, and this, in turn, leads to further unemployment and a depression of the economy. The prompt receipt of unemployment compensation during the critical initial stages of unemployment, however, increases the worker's spending power and in effect stabilizes the overall economic situation. Any significant delay in paying unemployment compensation, on the other hand, contributes to an economic decline.

Congress recognized that unemployment compensation benefits must promptly be made "due" in the initial stages of unemployment, and required in Section 503(a)(1) of the Act that state procedures "be reasonably calculated to insure full payment of unemployment compensation when due." The California procedures for disbursement are not in conformity with this requirement. Section 1335 assures that unemployment insurance benefits are not promptly paid in this state. In the event of an employer's appeal of a Departmental eligibility ruling in an employee's favor, the payment of all unemployment benefits is suspended for many weeks and, in some cases, months. Employers have virtually nothing to lose in filing such appeals and do so as a matter of course. In light of the desire of Congress, therefore, to stabilize consumer demand in the incipient stages of an economic decline, Section 1335 clearly is not "reasonably calculated to insure full payment of unemployment compensation *when due.*" (Emphasis supplied).

The Congress also intended unemployment insurance to accumulate "reserves in times of employment from which partial compensation may be paid to workers who became

unemployed and unable to find other work." *H.R.Rep. No.* 615, 74th Cong. 1st Sess. p. 7 (1935) [hereinafter *H.Rep.*]. Unemployment insurance is not intended to provide an unlimited amount of compensation to all who are unemployed. "Any attempt to make it do so confuses unemployment compensation with relief, which it is designed to replace in large part. It can give compensation only for a *limited period* and for a percentage of the wage loss." *Id.* Emphasis supplied *See also S.Rep. No.* 628, 74th Cong., 1st Sess. 10-13 (1935) [hereinafter *S.Rep.*]. The reason for making the compensation available for a limited period of time rests on the assumption that the worker will seek and find new employment during the period in which he is receiving benefits, and that once he achieves his goal, unemployment compensation is no longer necessary. The crucial period therefore in which the immediate need for compensation arises, and at which the Act is directed, is the time of unemployment and only that period. This is when unemployment compensation is "due" under Section 503(a)(1) of the Act.

Again, the Congressional intent is frustrated by the application of Section 1335. When an employer appeals, no benefits are paid to an eligible employee during the critical initial period of unemployment—the time between jobs. By the time the employee wins the appeal and receives his benefits, he may well have found new employment. Clearly the Congress did not intend unemployment insurance to be paid at any time other than the "limited period" of initial unemployment.

The 1935 Congress also passed the Act to "enable workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment *without having to resort to relief* . . ."*H.Rep.* at 7 (Emphasis added).

To insure that unemployed workers will not be required to resort to welfare, it is essential that state procedures provide for the payment of unemployment insurance benefits during the initial stages of unemployment. California procedures do not offer such protection. On the contrary, because of Section 1335 both plaintiffs, Java and Hudson, have had their benefits suspended during this critical period, and consequently, each has been forced to turn to welfare for support.

Unemployment insurance was viewed by the Congress as a right not a handout. It was developed because of the community's inability to provide the fiscal organization and resources necessary to meet the exigencies of mass unemployment on a charitable basis. See *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87; Note, 73 *Yale L.J.* 357, 359 (1963). In addition to the economic need, there was an ethical factor as well — i.e. the fact that the psychological impact of receiving "charity" undermined the self-respect and independence of the unemployed "employables".

The legislative history of the federal provisions clearly reflects the idea that unemployment compensation was *not* considered charity.

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. 79 *Cong. Rec.* 5468 (1935)
>
> In place of the present humiliating, inadequate, and uncertain method of granting relief to the workers through public and private charity, unemployment

> insurance would provide a much more self-respecting type of protection. Under such a system those who were unemployed through no fault of their own would receive, under certain conditions, benefits which would be theirs *by right* and which would be definite in amount . . . A great saving of self-respect and a more decent provision for the fundamental needs of the unemployed and of their families would inevitably result. *Douglas, Standards of Unemployment Insurance* 20 (1933) (Emphasis supplied).

In order to protect the "right" to unemployment insurance Section 503(a)(1) requires state procedures "to be reasonably calculated to insure full payment of unemployment compensation when due." California's procedures are not in conformity with this standard. Plaintiffs were ruled eligible for compensation by the defendants months ago. This was the time in which Congress intended benefits to be "due". Because of Section 1335, however, no benefits have been received by the plaintiffs for over two months. They have been compelled to resort to the welfare system and have been rendered unable to support their families in an adequate fashion.

These months in which plaintiffs have not been paid unemployment compensation are the period with which the 1935 Congress was concerned in enacting the unemployment compensation system: The weeks in which an unemployed worker is without employment and is desperately in need of compensation in order to seek another job; the period in which a worker is striving to avoid having to seek relief from the welfare system; the time that is critical to the stability of the economy in the event of widespread unemployment. Section 1335 of the California Code, therefore, is not in conformity with Section 503(a)(1) of the 1935 Social Security Act and must be overturned.

B. *Section 503(a) (3) of the Social Security Act of 1935.*

The *right* to unemployment insurance was also protected by Section 503(a) (3) of the 1935 Act which provides in part:

> (a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he finds that the law of such State . . . includes provision for—
>
> (3) Opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied.

Section 1335 of the Code is not in compliance with this provision. It requires an automatic stay of benefits for which an unemployed worker has previously been found eligible by the Defendant Department, merely because an appeal has been filed by his employer. No reasons are given to the worker for this termination of funds. No opportunity is provided to contest the denial of funds before it occurs. Under Section 1335, unemployment insurance benefits are *denied* to an eligible employee during the critical stages of unemployment.

Section 503(a) (3) was designed to prevent arbitrary State administrative interference with the payment of unemployment benefits during the critical stages of unemployment. In order for Section 503(a) (3) to achieve its purpose, the Congress intended that a fair hearing be held and reasons articulated *before* eligible claimants could be denied unemployment benefits during these important months. Section 503(a) (3) hearings must, of course, take place at a meaningful stage in the unemployment compensation process. And in order to be meaningful, a hearing "decision must be rendered *before* aid can be withheld." *McCulloch v. Terzian* 275 Cal.App.2d 745, 754 (1969).

(Emphasis supplied) *Accord, Kelly v. Wyman,* 294 F.Supp. 893. (S.D.N.Y., Three Judge Court, 1968); *Moore v. Houston,* ..... N.W. 2nd ..... (Mich.Cir.Ct., No. 104435, 1968); *Cf. Wheeler v. Montgomery,* 296 F.Supp. 138 (N.D. Cal., Three Judge Court, 1968).

Section 1335, however, completely bypasses Section 503(a) (3) and provides for an automatic denial of benefits for a prolonged period without a hearing. Precisely the kind of arbitrary action that Section 503(a) (3) was intended to guard against often occurs, since benefits are denied during this period no matter how frivolous the employer's appeal may be. Even when a claimant who has been found eligible is sure to prevail on appeal, he receives no funds until the appeal is decided. By then he may have been driven to welfare, or he may be reemployed, but, in either case, he will not have received his benefits during the period in which he is entitled to receive them. A Section 503 (a) (3) hearing, however, would have revealed the claimant's right to continued compensation and prevented such arbitrary administrative action.

In providing for the automatic withholding of funds from an eligible claimant without a hearing, Section 1335 of the California Code is not in conformity with Section 503(a) (3) of the 1935 Social Security Act and must be overturned.

III. A. DUE PROCESS REQUIRES A HEARING PRIOR TO A SUSPENSION OF UNEMPLOYMENT BENEFITS FOR WHICH AN UNEMPLOYED WORKER HAS PREVIOUSLY BEEN DETERMINED ELIGIBLE BY THE STATE — ESPECIALLY WHEN SUCH A STAY IS OPERATIVE UPON THE MERE ACT OF FILING AN APPEAL BY THE WORKER'S FORMER EMPLOYER.

We begin with the proposition that no one may be deprived of property by state action unless first given notice

and an opportunity to be heard. As recently as 1962, the Supreme Court noted that the right to be heard in civil litigation is "one of the most fundamental requisites of due process." *Schroeder v. New York,* 371 U.S. 208, 212 (1962). The Court has held that in "administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a fair and open hearing, . . ." *Morgan v. United States,* 304 U.S. 1, 15 (1937). Such a hearing was described by the Court as an "inexorable safeguard." *Id.* "Cases requiring that administrative hearings be held before agency action directly affecting *personal well-being* becomes final are increasingly common." *Kelly v. Wyman,* 294 F.Supp. 887, 891 (S.D.N.Y. 1968) (Emphasis added). See also, *Gonzales v. Freeman,* 334 F.2d 570 (D.C.Cir. 1964); *Hornsby v. Allen,* 326 F.2d 605 (5th Cir. 1964). *Homer v. Richmond,* 292 F.2d 719 (D.C. Cir. 1961). See also *Southern Railway Co. v. Virginia,* 290 U.S. 190 (1933); *Londoner v. City and County of Denver,* 210 U.S. 373 (1908).

Due process as it pertains to the right to a hearing has been held to apply to public officials in charge of employment, *Greene v. McElroy,* 360 U.S. 474 (1959), licensing, *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963), public schooling, *Dixon v. Alabama State Board of Education,* 294 F.2d 150 *cert.denied,* 368 U.S. 930 (1961); *Stricklin v. Regents of University of Wisconsin,* 297 F.Supp. 416 (W.D.Wis., 1969), and public housing, *Ruffin v. Housing Authority of New Orleans,* 301 F.Supp. 259 (E.D.La., 1969).

The latest Supreme Court case involving the Constitutional right to be heard prior to being deprived of property is *Sniadach v. Family Finance Corp. of Bay View,* 395

U.S. 337 (1969). In *Sniadach* the Court struck down a Wisconsin procedure whereby a creditor was able to attach his debtor's wages before judgment and before a hearing on the merits. The Court stated that a debtor's wages may eventually be "unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have. . . ." *Id* at 339. The Court in *Sniadach* determined that when "the sole opportunity to be heard comes after the taking," there has been a violation of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A most recent case expounding the principle that one cannot be deprived of his property without a prior opportunity to be heard was *Kelly v. Wyman,* 294 F.Supp. 893 (S.D.N.Y. three judge court, 1969). In *Kelly,* several recipients of Aid for Dependent Children benefits under the Social Security Act, 42 U.S.C. sections 601 *et seq.,* were being deprived of such benefits without a hearing before the proper local agency. New York procedures provided for a fair hearing only at a date subsequent to the termination of benefits. The court held that "due process" requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." 294 F.Supp. at 901. Results similar to the *Kelly* case were reached in *McCulloch v. Terzian,* 275 Cal.App.2nd 745, 754 (1969), in which the court held that a hearing "decision must be rendered *before* aid can be withheld" (Emphasis added), and in *Moore v. Houston,* ..... N.W. 2d ..... (Mich. Cir.Ct., No. 104435, 1968). *Cf. Wheeler v. Montgomery* 296 F.Supp. 138 (N.D.Cal., three judge court, 1968), a case decided prior to the decision in the *McCulloch* case, in which

the court rejected the argument that a full fledged hearing was required before the termination of welfare benefits, but held that "at least some hearing prior to the determination of O.A.S. [Old Age Security Benefits] was constitutionally compelled." 296 F.Supp. at 139.

The court in *Kelly* recognized that plaintiffs and their families had suffered greatly as a result of the termination of their benefits. The court stated that to cut off benefits "in the face of this 'brutal need' [of benefits] without a prior hearing . . . is unconscionable unless overwhelming considerations justify it." 294 F.Supp. at 900. Similar hardships face the plaintiffs in the instant case. Moreover, the "overwhelming consideration" that the state proffered in *Kelly* consisted of an interest in protecting the public tax revenues. This interest was not deemed to outweigh the recipient's interest in a "continuation of benefits while a claim of eligibility is disputed." *Id.*

Like plaintiffs in *Kelly* and *Sniadach,* the plaintiffs, Java and Hudson, have suffered severe financial injury as a result of the termination of their benefits. Moreover, in the case at bar, unlike the *Kelly, McCulloch, Moore,* and *Wheeler* cases, plaintiffs have already been determined eligible for benefits as a matter of right by the State itself.

Like Mrs. Sniadach, and the plaintiffs in *Kelly, McCulloch,* and *Moore,* therefore, plaintiffs have a constitutional right to a hearing under the Due Process Clause before their unemployment insurance benefits may be cut off. Section 1335 of the California Code does not afford them this right and is hence unconstitutional.

Pursuant to Section 1335, plaintiffs' benefits were cut off without a hearing solely because their employers filed appeals of State eligibility determinations in plaintiffs' favor and, under Section 1335, their benefits may not be

restored until the appeals have been heard and *second* decisions in their favor have been rendered—a period that may last for several months. Meanwhile, plaintiffs and their class have been deprived of all unemployment insurance benefits during the very weeks in which they are most needed, and moreover, they have no recourse other than to await a decision on the employer's appeal.

Under Section 1335, the question of whether their benefits should be suspended is in no way dependent upon the nature of the employer's case or on the merits thereof. Any act of filing will result in a stay regardless of how frivolous it may be. Plaintiffs contend that the procedure authorized by Section 1335 is totally arbitrary in nature and offends all principles of fair play and justice. " 'Men must turn square corners when they deal with the government.'[3] But the government in dealing with its citizens owes them an equal obligation to right its angles." *Robertson v. United States,* 404 F.2d 1141, 1145 (5th Circuit, 1968). Section 1335 violates the Due Process Clause of the Fourteenth Amendment and consequently is unconstitutional.

B. THERE EXIST NO OVERWHELMING CONSIDERATIONS TO JUSTIFY THE PRESENT PROCEDURE THAT RESULTS IN AN AUTOMATIC SUSPENSION OF BENEFITS WITHOUT A PRIOR HEARING

The court in *Kelly v. Wyman,* 294 F.Supp. 893, 900 (S.D. N.Y. three judge court, 1968), held that "to cut off a welfare recipient . . . without a prior hearing of some sort is unconscionable unless overwhelming considerations justify

3. "Holmes J., *Rock Island, Arkansas and Louisiana Railroad v. United States,* 254 U.S. 141, 143 (1920).

it. Traditionally, such considerations have been urgent in nature and involve the health, safety and well-being of many individuals." In determining when a due process hearing may be delayed, the courts have resorted to a balancing of public and private interests. See *Gonzalez v. Freeman*, 334 F.2d 570 (D.C.Cir.1964); *R.A. Holman & Co. v. S.E.C.*, 299 F.2d 127 (D.C.Cir. 1962); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, *cert. denied* 368 U.S. 930 (1961); *Kelly v. Wyman, supra.* When applied to the problem of unemployment compensation benefits, this test demonstrates the clear superiority of the unemployed worker's interest to those of the defendant. This is true both in the context of prior decisions such as *Kelly, McCulloch,* and *Moore, supra,* and of the purposes of Congress in enacting the Unemployment Compensation Statutes.

The sole interest of the defendant in delaying a hearing until after benefits have been discontinued is a financial one: to protect the public treasury. This interest is of a different order from those which have been held to justify subordination of the private interest. The cases upholding summary administrative action have involved the prevention of some direct harm to the health, safety or well-being of other individuals. *See e.g. Yakus v. United States,* 321 U.S. 414 (1944); *North Amer. Cold Storage Company v. City of Chicago,* 211 U.S. 306 (1908). Thus in an early case the Supreme Court upheld, without a hearing, the summary seizure of allegedly decayed food products. *North American Cold Storage Co. supra.* In a more recent case, the Court has allowed the Food and Drug Administration to seize allegedly mislabeled commodities before a hearing. *Ewing v. Mytinger & Casselberry Inc.*, 339 U.S. 594 (1950). In 1962, the District of Columbia Circuit recognized the public interest in protecting private individuals from fraud

in the securities markets and approved a narrowly drawn summary order issued by the SEC. See *R. A. Holman, supra.*

The public interest in postponing fair hearings protects only the government purse. There is no harm to other specific individuals if payments to a claimant who has been determined eligible is continued until his employer's appeal has been heard and decided. If his employer should win the appeal, the employer's unemployment compensation reserve account is immediately credited with all monies that have been paid to his employee pending the appeal. It is the State's responsibility — not the employer's — to recoup all funds that have been paid previous to the appeal. Moreover, the money dispensed is clearly not lost forever from the public till. The State of California has a statutory right to proceed against an individual to recover compensation to which he is not entitled. Hence, if it is later determined that the claimant is ineligible, the state can both discontinue his benefits and recover the benefits made since the date of ineligibility. California Unemployment Insurance Code, Sections 1375-80 (1969 Supp.). If this procedure should prove unsuccessful, the state has other powers to aid it in obtaining recoupment. For example, it can offset the amount of any overpayment against any future unemployment benefits or state disability insurance for which the claimant becomes eligible. *Cal. Unemployment Insurance Code Section 1379.*

The defendants in the pre-termination hearing cases in the welfare area, *Kelly, McCulloch,* and *Moore,* contended that recoupment of funds was impossible since most welfare recipients are judgment proof. Nevertheless, the courts in all three cases held that the possible loss of these funds was outweighed by the plaintiffs need for these benefits during the period prior to the hearings. Pre-termina-

tion hearings, therefore, were held to be constitutionally required before recipients' assistance could be cut off.

In the field of unemployment insurance, the state's chances of recoupment of benefits (if the employer should prove successful on his appeal) are much better than in the welfare area. Under the California Code, to receive an initial determination of eligibility from the Department, a claimant must be "employable". Upon reemployment, the claimant will, of course, have assets that will be subject to the State's statutory powers of recoupment, *supra*. Plaintiffs Java and Hudson, for example, were both determined "employable" by the State itself when they were ruled eligible for unemployment benefits. Their affidavits show that Plaintiff Hudson had been continuously employed as a cashier for four years prior to her discharge; and that Plaintiff Java had been continuously employed as a newspaper reporter for two years prior to her discharge.

Even if we were to accept the assumption that situations might arise where recoupment by the State would not be possible, there is still no justification for Section 1335 which prohibits the payment of benefits pending employer appeals. Since employer appeals are filed as a matter of course, Section 1335 insures that unemployment insurance is rarely paid in California during the critical initial period of unemployment, despite the purpose and policy of the national unemployment program which dictates that benefits are due and must be paid immediately, once claimants are determined eligible. *See* pp. *2-7 supra*. Furthermore, as in the case of welfare, there is a compelling individual interest on the part of thousands of citizens in a prior hearing before unemployment benefits may be discontinued.

There are no "overwhelming considerations" that justify a suspension of unemployment benefits without a prior

hearing. Section 1335, therefore, is unconstitutional under the Due Process clause of the Fourteenth Amendment.

IV. SECTION 1335 IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Under California procedure, both employers and employees are entitled to appeal the Departmental eligibility determinations if they are not satisfied with the findings therein. California Unemployment Insurance Code sections 1030-1328.

An employee's appeal, however, has an entirely different effect on the State's initial eligibility decision than does an appeal by an employer. When the Department determines the claimant is ineligible for benefits and the claimant appeals, the Department's ruling is given immediate effect. No benefits are paid to the claimant, and the employer's account is not charged, until after a hearing has been held and a decision has been rendered. California Unemp. Ins. Code, §§ 1032, 1335. In contrast, when the department determines that the claimant is eligible for benefits and commences payment, and the employer appeals, the department's ruling is not given effect. The claimant is deprived of the payments without a hearing and adverse decision, on the mere possibility that a future decision may be adverse.

In determining whether a classification results in the kind of invidious treatment proscribed by the Equal Protection Clause, the courts normally will not disturb the legislature's judgment unless the classification, in light of the intended effect, is palpably arbitrary. *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *International Harvester Co. of America v. Missouri,* 234 U.S. 199, 215 (1914); *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 70 (1913). When chal-

lenged on equal protection grounds, the "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964). Although there is a clear presumption of constitutionality in economic regulation cases, *Golsaert v. Cleary,* 335 U.S. 464 (1948), the presumption may be overcome, if it is determined that the classification bears no substantial, rational relation to a legitimate object of regulation, and is patently arbitrary. *Morey v. Doud,* 354 U.S. 457 (1957); *Truax v. Corrigan,* 257 U.S. 312 (1921).

The procedure dictated by section 1335 is clearly arbitrary in its application. The essence of the unemployment insurance scheme is to ameliorate the economic instability caused by a loss of employment, to keep unemployed workers off relief and to promote the reemployment of the worker. Section 1335 frustrates these purposes by permitting employers to cause loss of benefits to employees when they are most in need, regardless of the merit of the employer's case. Section 1335 thus impedes the reemployment of the individual by depriving him of necessary funds with which to seek employment. As the affidavit of Ralph Warner points out, benefits are often delayed under Section 1335 for several months.

There is no rational basis for suspending initial state eligibility determinations on employer appeals, and not suspending such determinations on appeals by employees. The need to assure recoupment of benefits by the Department if the employer should win his appeal is not a sufficient basis for Section 1335. Section 1335 is not necessary to protect the interests of employers because an employer's account cannot be charged in the event of an erroneous overpayment by the State. California Unemployment Insurance Code Section 1335. Nor is it necessary to protect the public

purse, for, if an employer should win his appeal, the Department can recoup an overpayment out of any future claim for either unemployment insurance or state disability insurance. California Unemployment Insurance Code Section 1379.

Moreover, Section 1335 is applied indiscriminately to all employees whose employers have appealed initial eligibility determinations in their employees' favor, even though employer appeals rarely are successful. *See* affidavit of Ralph Warner. No attempt is made to distinguish between appeals that might be meritorious and those that clearly will be unsuccessful. Thus, there is no justification for treating employers' appeals of unemployment insurance eligibility determinations differently than appeals by employees. The procedures authorized by Section 1335 of the California Code work great hardship on claimants for unemployment insurance and deny them equal protection of the law.

V. CONCLUSION

For the reasons stated above, Section 1335 of the California Unemployment Insurance Code should be declared in violation of the Social Security Act and unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and its enforcement should be enjoined.

Respectfully submitted,

CONTRA COSTA LEGAL SERVICES FOUNDATION

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In the United States District Court for the Northern District of California

Filed Dec. 5, 1969

No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

ANSWER TO COMPLAINT

Defendants answer the complaint and allege as follows:

I

Defendants admit the allegations contained in Paragraphs I, VIII, IX and XI of the complaint.

II

Defendants deny the allegations contained in Paragraphs II-VII, XIV-XVIII.

III

Answering Paragraph X, defendants admit the allegations contained therein and further allege that defendant Director Gilbert L. Sheffield and each of his predecessor directors in office have formulated a state plan for unemployment insurance and filed with the Secretary of Labor such state plan for unemployment insurance consistent with the provisions of 42 USC 501, et seq.; that such state plan and the provisions of the Unemployment Insurance Code and the former Unemployment Insurance Act have been certified by the Secretary of Labor to conform with the provisions of 42 USC 501, et seq., including the provisions of section 1335 of the Unemployment Insurance Code and its predecessor section; and that federal funds for the unemployment insurance program in the State of California have been received by the Department of Human Resources Development and its predecessor the Department of Employment, were so received during all periods involved in the proceeding before the Court, and are being so received predicated upon the approval and certification of the California state plan for unemployment insurance by the Secretary of Labor.

IV

Answering Paragraph XII, defendants admit the allegations contained therein except that defendants deny that the former employer of plaintiff Java filed a notice of appeal "of the decision" by the Department in her favor and defendants allege that the former employer of plaintiff Java filed a notice of appeal "from the determination" by the Department in her favor.

Defendants further allege that at a hearing held on November 12, 1969, before Referee Walter M. Oros of the

Oakland office of the California Unemployment Insurance Appeals Board, plaintiff Java requested a continuance of the hearing and that the referee granted plaintiff Java's request for a continuance to December 1, 1969, and that said hearing was in fact concluded on December 1, 1969. Defendants further allege that on December 3, 1969, Referee Oros rendered his decision reversing the initial determination, ruling that Miss Java was disqualified from receiving benefits.

V

Answering Paragraph XIII, defendants admit the allegations contained therein except that defendants deny that plaintiff Hudson's former employer filed a notice of appeal "of the decision" by the Department in her favor and defendants allege that plaintiff Hudson's former employer filed a notice of appeal "from the determination" by the Department in her favor.

Defendants further allege that on November 12, 1969, Referee Henry Heide issued his decision in case number OAK-12591 affirming the determination of the Department that plaintiff Carroll H. Hudson is entitled to benefits but that the referee declared that the Department should investigate whether plaintiff Hudson refused a job offer in September 1969.

Wherefore, defendants pray that the complaint be dismissed, that plaintiffs take nothing by their complaint, and that the Court grant such other relief as is proper in the premises.

Dated: December 5, 1969

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Plaintiffs,

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California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

MOTION TO DISMISS COMPLAINT

Defendants move the Court to dismiss the action on the grounds:

1. That the action is moot;

2. That the Secretary of Labor and the employers who contribute to the Reserve Fund for payment of unemployment insurance are indispensable parties to this action; and,

3. That plaintiffs have failed to state a claim against defendants upon which relief can be granted.

Dated: December 5, 1969

THOMAS C. LYNCH, Attorney General
ASHER RUBIN
Deputy Attorney General
Attorneys for Defendants

POINTS AND AUTHORITIES

In support of this motion defendants incorporate by reference as if fully set forth herein the Memorandum of Points and Authorities submitted by defendants in support of their answer to the complaint, which is also filed herewith.

Dated: December 5, 1969

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vs.

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Defendants.

POINTS AND AUTHORITIES IN SUPPORT OF ANSWER AND MOTION TO DISMISS COMPLAINT

I
INTRODUCTION

The answer to the question raised in this action can seriously and prejudicially affect the unemployment insurance program of the State of California and similar programs in 46 other states (Exhibit 1). In 1968, there were 960,180 claims for unemployment insurance benefits in the

State of California. (Exhibit 2.) A substantial alteration in processing claims of such magnitude would have a serious financial impact on the State of California and impose on it a crushing administrative burden. But defendants do not for defense merely rely on the staggering financial cost and impossible administrative problems posed by the program advocated by plaintiffs. Defendants maintain that the law under attack, a law which has been continuously on the books in California since 1937,[1] is in conformity with the relevant federal statutes and is constitutional within the meaning of the due process clause and the equal protection clause of the Fourteenth Amendment.

II

THE COMPLAINT AS TO PLAINTIFFS JAVA AND HUDSON IS MOOT AND SHOULD BE DISMISSED.

The Court may not decide this case unless a justiciable controversy exists.

> "A justiciable controversy is distinguished from a hypothetical or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.*, 253 U.S. 113, at 116 . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." [Citations omitted.] *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240.

See *Portland Web Pressmen's Union Local No. 17 v. Oregonian Publishing Co.*, 9th cir., 286 Fed.2d 4, cert. den., 366 U.S. 912; see also 3 Barron and Holtzoff, Fed. Prac. & Proc. §§ 1263, 1431; *cf. Clark v. Flory*, 237 Fed.2d 597.

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1. Section 1335 was enacted in 1953 as part of the Unemployment Insurance Code, Ch. 308, Stats. 1953. It was based on Ch. 742, § 8, Stats. 1937; Ch. 1085, § 4, Stats. 1939; Ch. 1369, § 2, Stats. 1945; Ch. 1436, §§ 1, 3, Stats. 1947.

No such controversy exists here.

Plaintiff Carroll H. Hudson appeared together with her last employer at a hearing in Oakland, California, on November 7, 1969. On November 12, 1969, Senior Referee Henry Heide rendered and mailed a four-page decision, affirming the Department's initial determination that Miss Hudson was entitled to receive unemployment benefits. Defendants are informed that benefits to plaintiff Hudson are now being paid in accordance with section 1335(b) of the Unemployment Insurance Code. Thus, Miss Hudson's claim is moot and she should be dismissed as a party plaintiff.

With respect to plaintiff Java, defendants are informed that the referee has now rendered his decision reversing the initial determination in favor of Java, and holding that she is entitled to no benefits. In effect, this wipes out the first ruling and renders moot Miss Java's prayer for benefits pending appeal from a favorable determination. The decision of the referee means that she was entitled to benefits at no time and hence the provisions of section 1335 that no benefits are to be paid pending an appeal to a referee is not strictly relevant. This is not to say that Miss Java does not have the possibility of ultimately being entitled to retroactive payments for the subject period. Should she prevail in an appeal to the Appeals Board, her right to such benefits would be established and she would be paid. No recourse to the courts would be necessary. It would be improper, however, and a gift of public funds for the state at this point to pay her any benefits now that an adverse decision of the referee has been made.

Plaintiffs' action was directed at the stay provisions of section 1335. Now that the referee has made his decision

there is no such stay in effect. Hence, plaintiff Java's suit is moot and, since the class is thus deprived of representation by any named plaintiffs, the action as to the class must also be dismissed. Rule 23, F.R.C.P.

III

THE ACTION SHOULD BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES

A. *The Secretary of Labor Should be Joined.*

Defendants maintain that the Secretary of Labor of the United States and the employers of the State of California who contribute to the Unemployment Insurance Fund are indispensable parties to this action. With respect to both, the standard for determining their indispensability is as follows:

> "Whether the United States is an indispensable party to an action is determined by applying the same rules and principles which apply to individuals and private corporations. In other words, the United States is an indispensable party to an action if it has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other party to the suit without radically and injuriously affecting the interest of the United States or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." 2 Kooman, Federal Civil Practice, 431. See also Rule 19, F.R.C.P.

The interests of the United States are inextricably tied into the present cause. In effect, plaintiffs are charging that the Secretary of Labor has acted improperly in approving the California plan and that he has thus violated the duty imposed on him by 42 U.S.C. § 503. That section provides that the Secretary of Labor shall make no certifica-

tion for payment to a state unless the state provides "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; . . .". 42 U.S.C. § 503(a)(3). Should this Court rule that California's current procedures in this respect are inadequate, in order to grant complete relief the Court would be compelled to instruct the Secretary to withdraw his certification until the California plan has been altered to comply with the Court's directive.

The interest of the Secretary of Labor is further confirmed by the fact that this Court's ruling would affect the Secretary's certification of the plans of 46 other states. The Secretary, of course, should act in a consistent manner and subject each state to identical standards. If the standard in California is altered by this Court's decision, the Secretary, in the interest of evenhanded administration, would be required to re-examine his position with respect to the plans of those 46 other states which contain a statutory section similar to section 1335 of the California Unemployment Insurance Code.

Rule 19(a) provides for joinder of a party whose absence would "... leave any of the persons already parties subject to a substantial risk of incurring doubt, multiple, or otherwise inconsistent obligations by reason of his claimed interest." It is conceivable that the Secretary of Labor could take the view that no decision of this Court is binding on him since he is not a party to the litigation. This could place the defendant State of California in the intolerable position of either obeying the order of the Court or adopting the contrary position of a Secretary of Labor. Such a dilemma would be avoided if the Secretary were joined as a party.

See generally *Skokomish Indian Tribe v. France*, 269 Fed.2d 555; see also Order Granting Defendants' Motion to

Dismiss in *Romero v. Wirtz,* now pending before this Court, Action No. 50213. For figures on the participation of the United States in the unemployment insurance program of the State of California, see plaintiffs' brief, page 3, footnote 2.

B. *The Employers of the State of California Should be Joined.*

As with the federal government, the employers of this state will be vitally affected by the outcome of this case. The following analysis demonstrates that it is only a matter of time and arithmetic before the employers' tax rate and liability rise in response to a court decision which, to be implemented, will require more revenue than is currently available.

Rule 19, F.R.C.P., requires joinder if a person claims an interest and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. For reasons discussed below, California employers have a substantial interest in the disposition of this action and unless they are joined their ability to protect that interest will be impaired or impeded.

A decision in favor of plaintiffs in this action could substantially increase the amount of taxes paid by California employers to the Unemployment Fund. This increase could result in three different ways:

1. Under section 930 of the Unemployment Insurance Code the wage base on which employers pay taxes for a given year could be $4,100 per employee per year, rather than $3,800. Every employer would in that event pay taxes on the first $4,100 wages paid to each employee, rather than the first $3,800 wages paid to each employee.

2. Under section 976.5 of the Unemployment Insurance Code, the balancing account tax rate paid by employers for

a given year could be at least 0.2% higher than it would be if plaintiffs do not prevail.

3. Under sections 977 and 978 of the Unemployment Insurance Code, the high tax rate schedule under section 978 could apply for a given year, resulting in tax rates for employers as much as 0.8% higher than those under the lower tax rate schedule under section 977 which would apply if plaintiffs do not prevail.

If plaintiffs prevail in this action, an annual unrecoverable loss to the Unemployment Fund would result in the amount of at least $800,000 (Exhibit 2). The loss is cumulative. For example, at the end of five years the total loss would be at least $4,000,000. This annual charge and reduction in what would otherwise be the balance in the Unemployment Fund could cause, in some future years, an increase in employers' tax liability to the Unemployment Fund of as much as $154,000,000 (Exhibit 3).

Under section 930 of the Unemployment Insurance Code, employers pay taxes on the first $3,800 of wages paid each employee during a year whenever the revenues to the Unemployment Fund are equal to or exceed fund disbursements for the preceding fiscal year. Whenever fund disbursements exceed revenues for the preceding fiscal year, employers pay taxes on the first $4,100 of wages paid each employee during the ensuing calendar year. The addition of at least $800,000 annual fund disbursements if plaintiffs prevail herein could, in some year or years, obviously result in imposing the $4,100 wage base rather than the $3,800 wage base. In such case the increased employer liability would approximate $28,000,000 a year (Exhibit 3).

Under section 976.5 of the Unemployment Insurance Code, employers pay at a flat balancing account tax rate

ranging in 0.2% intervals from 0.2% to 1.0%, depending upon the percentage of charges to credits in the balancing account. The addition of at least $800,000 annual charges to the balancing account if plaintiffs prevail herein, could, in some year or years, result in imposing a tax rate under section 976.5 increased by 0.2% from what would otherwise be the rate. The increased employer liability for a year would approximate $38,000,000 (Exhibit 3).

Under sections 977 and 978 of the Unemployment Insurance Code, whenever the Unemployment Fund year-end balance equals or exceeds 5% of wages paid in employment during the preceding fiscal year, employers pay taxes under a low rate schedule ranging from 0.0% to 2.7%, depending on their employer reserve account ratio. Whenever the fund balance is less than 5% under the formula, employers pay much higher taxes under the high schedule ranging from a minimum of 0.8% to 2.7%, depending on their employer reserve account ratio. An employer whose tax rate was 0.0% on the low rate schedule would pay at the 0.8% rate on the high rate schedule. The tax rates of most other employers would also be increased on the high rate schedule. The cumulative reduction in the Unemployment Fund balance which would result if plaintiffs prevail herein, could, in some year or years, obviously result in imposing the high tax rate rather than the low tax rate. The total increased employer liability for a year on the high rate schedule would approximate $88,000,000 (Exhibit 3).

Were this Court to issue a decision in favor of the plaintiffs in the absence of employer representation as a party herein, the substantial employer interest in the disposition of this action would be impaired and impeded. No apparent future remedy would exist. This Court, in an

analogous situation, recently issued its order for dismissal for failure to join employers, with leave to amend. *Romero v. Wirtz,* Civil No. 50213. We submit that the joinder of employer representation as indispensable parties is required under Rule 19 and in the absence of such joinder the Court should dismiss the action.

IV

SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS IN CONFORMITY WITH THE FEDERAL STATUTES.

A. *The California Plan Provides For Payments "When Due".*

Plaintiffs point out that section 503(a)(1) of the Social Security Act provides that the Secretary of Labor shall not certify a plan unless the state procedure is "reasonably calculated to insure full payment of unemployment compensation when due". Plaintiffs then discuss the legislative history and conclude that "the crucial period therefore in which the immediate need for compensation arises, and at which the Act is directed, is the time of unemployment and only that period. This is when compensation is 'due' under section 503(a)(1) of the Act." Plaintiffs' brief, p. 5, 13-16.

At the outset it should be established that unemployment insurance benefits are to be paid irrespective of need. "Unemployment compensation is greatly preferable to relief *because it is given without any means test.*" (Emphasis added.) House Report No. 615, 74th Congress, 1st Session (1935). "Unemployment compensation differs from relief in that payments are made as a *matter of right, not on a needs basis,* but only while the worker is involuntarily unemployed." (Emphasis added.) Senate Report No. 628, 74th Congress, 1st Session (1935).

Although at one point plaintiffs appear to recognize that need is irrelevant in determining whether they may receive unemployment benefits (plaintiffs' brief, p. 6, 13-27), plaintiffs nevertheless argue their obvious need as the basis for immediate receipt of unemployment benefits. Indeed, plaintiffs contend they should be paid unemployment benefits because they need them, and that they should be paid unemployment benefits immediately because their need is desperate. Neither contention can be sustained, since need is irrelevant to eligibility for unemployment benefits. Unemployment benefits are payable to involuntarily unemployed persons who meet statutory conditions, regardless of whether the person claiming benefits is rich or poor. Benefits cannot be denied because a person is rich and doesn't need them; they cannot be granted because a person is poor and needs them.

The emphasis on involuntary unemployment, and not need, as the determinant of eligibility for unemployment insurance is further supported by California's Unemployment Insurance Code provisions. The amount of weekly benefits a worker receives varies proportionately with his wages in a four-quarter period and the quarter in which he receives his highest wages. Cal. Unemp. Ins. Code §§ 1275, 1280, and 1281. The higher his wages, the higher the weekly benefit and the total maximum benefits he receives. Thus, those who may have more need receive lower, not higher, benefits. Moreover, a worker who has less than $720 in the four quarters of his base period is not entitled to any benefits. Cal. Unemp. Ins. Code §§ 1275 and 1281. Consequently, the worker who may be *most* in need of unemployment insurance has no entitlement to benefits.

Thus, a claimant's need can have no effect on determining when payments are "due". The right to benefits is not accelerated in direct relation to the severity of a claimant's economic situation.

In the context of the Social Security Act the legislative history is unenlightening concerning the definition of the word "due". Generally, the primary meaning of that word is "owing". *People v. Buckles,* 57 Cal.App.2d 76, 79. The word connotes a matured and fixed obligation. *Cf., Joyce v. Scott,* 265 Fed.2d 369, 371-372. See also *In re Ingersoll Co.,* 148 Fed.2d 282, 284. In the instant case, it cannot be said that benefits are "owing" or that the obligation is fixed and immutable following an initial determination. In effect, the most that plaintiffs could establish is that after the initial determination favorable to them they have what might be termed an inchoate right. The right will become vested, so to speak, if the employer does not file an appeal or, in the event of such an appeal, the referee affirms the initial determination.

This timing represents a considered effort by the Legislature to minimize the possibility of inprovident payment. The initial procedure for determining whether a claimant is eligible for benefits does not amount to a full scale investigation nor does it remotely resemble a hearing at which the employer may fully air his views. At this preliminary stage no testimony is taken under oath, there is no right to confrontation, right to call witnesses, etc. For this reason the Legislature has decreed that the administrative determination of the Department that a claimant is entitled to benefits is not sufficient, standing alone, to justify immediate payment of those benefits. For that matter, a decision of a referee reversing an initial denial of benefits is treated in similar fashion, i.e., standing alone, a referee's decision awarding benefits following an initial denial is not deemed sufficient to justify an immediate payment of benefits. However, in the judgment of the Legislature, the risk of unwarranted and improper benefit payments is so re-

duced by the agreement of the Department and the referee that a claimant is eligible, that upon such concurrence benefits may reasonably be considered "due". Hence, at that point the Department commences payment immediately, despite the possibility that a later decision may eventually result in a ruling that the claimant is in fact ineligible.

The wisdom of the Legislature's decision in this regard is graphically illustrated by recent statistics. In 1968 there were 5,526 referees' decisions where claimants were initially determined to be eligible and following such determination, the employer appealed. The employers prevailed in 2,602 cases. In other words, employers were successful in 47% of the decisions issued. Had the Department been required to pay benefits to claimants during the pendency of any employer appeal, unjustified payments would have been made in 47% of the cases and would have resulted in approximate overpayment of $800,000. (Exhibit 2.) And, contrary to plaintiffs' argument concerning recoupment, the state would not have collected these overpayments for under section 1375 of the Code such overpayments would have been waived because they would have been "received without fault on the part of the recipient, and . . . recovery would be against equity and good conscience." Hence the $800,000 overpayment would have been unrecoverable.

Parenthetically, we might note that the determination concerning when payments from the state are "due" is one properly to be made by the Secretary of Labor and plaintiffs' argument in this regard should be directed at him. The Secretary of Labor has certified the California plan and, to defendants' knowledge, the plans of 46 other states which have provisions similar to the section being examined

here. Implicit in his certification is a finding by him that benefits are in fact paid by the state "when due". The Secretary is presumed to have acted correctly. Plaintiffs' facile arguments that payments are not being made "when due" are supported neither by the administrative findings of the Secretary nor by the commonly accepted legal meaning of the subject term.

B. *The California Plan Provides For a Hearing Which is Timely and Fair.*

On pages 7-9 of their brief plaintiffs contend that the California plan does not conform with the requirements of section 503(a)(3) of the Social Security Act, which provides that the Secretary shall make no certification unless he finds that the state provides for "(3) Opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied.". The argument is that staying benefits pending an appeal violates this provision. The argument has no merit.

First, the claims for benefits in the instant case have both been *granted,* not denied. Note that the language of the federal statute refers to "claims" which have been denied. It does not refer to a policy of withholding benefits after a claim has been granted. It would make absolutely no sense to believe that Congress intended that a state must provide a full scale hearing upon an applicant's first application for benefits. It is inconceivable that Congress would have intended that for the year 1968, for example, the State of California should have provided a full scale hearing in the 960,180 unemployment insurance claims which were filed in this state. This conclusion is buttressed by the fact that of the 368,022 claims which were denied, 226,066 were denied because the claimant was found to be disqualified or ineligible for benefits on some statutory basis, e.g., he was discharged because of misconduct.

The impracticability of affording a claimant a trial type hearing each time his claim comes up for review is also demonstrated by the fact that a claimant must meet several statutory conditions to continue to be eligible for benefits. These conditions must be met *each week.* Chief among the conditions to be met are that the claimant has registered for work, was able to and was available for work, and has sought suitable work in accordance with specific instructions of a public employment office. The claimant may be disqualified for a number of reasons. Among these are that the claimant left his most recent work voluntarily without good cause or was discharged for misconduct connected with his most recent work, that he made a false statement or representation or concealed material facts, that he, without good cause, refused to accept suitable employment when proffered, or that he left his work because of a trade dispute. The disqualification may be imposed after a claimant has been paid one or more weeks of benefits.

When a claim is filed, the Department mails notices to the claimant's last employer and each base period employer (Sections 1327 and 1329, Unemployment Insurance Code). Employers may protest eligibility by submitting facts to the Department. The Department conducts a fact-finding informal investigation and after considering all available facts determines whether the claimant is eligible and not subject to disqualification. No informal conference confrontation or trial type hearing is held; none is required. There is no testimony under oath, nor are witnesses called; there are none of the ordinary trappings associated with the trial type hearing concept. A claimant may be determined eligible and be paid benefits for one week, but in the next week be determined ineligible or disqualified. To require a trial type hearing each time would be absurd.

The sensible interpretation of section 503(a)(3) of the Social Security Act is that the portion which requires an opportunity for a fair hearing for individuals whose claims are "denied" should be construed as meaning "are *finally* denied". This means that a claimant who applies for unemployment insurance benefits will receive initially an administrative determination concerning his eligibility. If his claim is denied, he then has an opportunity to appeal and the denial is not considered final until he has had an opportunity for a fair hearing before a referee. On the other hand, if the claim is initially granted at the administrative level, the employer is given the right to appeal that determination because he is the one whose money pays the claimant's benefits.

IV

DUE PROCESS IS NOT VIOLATED BY A PROCEDURE WHICH PERMITS A SHORT STAY OF BENEFITS WHILE A REFEREE DECIDES AN APPEAL.

Plaintiffs argue that they are entitled to a hearing prior to being deprived of their property. In part, this begs the question. Plaintiffs have no property of which they can be deprived. Only a preliminary determination relating to their eligibility has heretofore been made. Before this determination matures into a binding adjudication requiring the state to pay benefits, fairness demands that the employer be given an opportunity to be heard.[1]

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1. Contrary to Ralph Warner's completely unfounded and self-serving statement that employers file appeals as a matter of course (see p. 2, lines 4-6, of Mr. Warner's Affidavit, attached to plaintiffs' Complaint; see also reference thereto, plaintiffs' brief, p. 4, lines 24-25), the statistics confirm that the nefarious motive attributed to the employer, i.e., filing frivolous appeals in order to hold up employees' benefits, simply does not exist. Indeed, the statistics show that employers are overwhelmingly conscientious in determining whether or not to appeal an initial determination. In 1966

A "suspension" (plaintiffs' brief, p. 9, line 4) cannot take place until an initial award has been made, a circumstance which does not obtain here.

Assuming arguendo, however, that the preliminary determination by a clerk at one of the Department's centers does confer some property rights on a claimant, we submit that nevertheless the procedures subsequent to this initial decision fully satisfy the demands of due process.

"Due process" and "fair hearing" are not magic incantations which can compress reasonable time intervals for administrative determination and obliterate carefully conceived administrative procedures. The requirements of due process necessarily vary with the type of proceeding involved, *Hannah v. Larche,* 363 U.S. 420, 440, and cannot be equated with inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers' Local 473 v. McElroy,* 367 U.S. 886, 895. In each case the nature of the alleged right, the nature of the proceeding, and the possible burden on that proceeding, are all relevant considerations. *Hannah v. Larche, op. cit.* at 442.

The procedures here are tailored to administrative necessity, but never at the expense of a claimant's rights. The problem is one of balancing, as was stated by Chief Justice

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there were 4,890 referees' decisions on employer appeals in which the employer prevailed in 2,201 cases or 45% of the time. In 1967 there were 5,567 such cases; employers prevailed in 2,432 cases, or 44% of the time. In 1968 there were 5,526 in which employers prevailed in 2,602 cases, or 47% of the time. In that year there were over 400,000 cases of claimants receiving benefits *with no appeals filed at any time.* See Exhibit 3. Indeed it is the employees or claimants who appeal far more often than the employer. In San Francisco, for example, from the period October 3 to November 12, 90 appeals were decided; of these 69 had been filed by claimants and only 21 by employers. In the same jurisdiction there are now some 163 pending appeals of which 125 have been filed by claimants and only 38 by employers. In other words, claimants appeal almost four times as often as employers.

Gibson in the case of *Abelleira v. District Court of Appeal,* 17 C.2d 280, 298:

> "The very essence of the act is its provision for the prompt payment of benefits to those unemployed. (See 88 Univ. Pa. L.Rev. 137, 139.) Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided. The legislature, recognizing the importance on the one hand of avoiding improvident payments without due consideration of the right thereto, and the danger on the other hand of withholding the payments for long periods through the slow processes of appeal to the commission and perhaps eventually to the courts, took a middle course. It provided for a preliminary appeal or review of the first determination where payments were ordered. This appeal, ordinarily decided in a short period of time, carries with it a stay. But when this second decision has also been made in favor of the applicants, the benefits begin, with protection, as already noted, for the employer in the event of later reversal."

Adopting the position advocated by plaintiffs here would radically alter the balance adverted to in *Abelleira* and would encourage dishonest and devious practices on the part of claimants. A claimant whose claim is initially determined to be valid would have incentive to delay any hearing and decision by a referee. If the claimant received benefits pending the appeal, it would be in his best interests to seek continuances and to plead that key witnesses are unavailable, etc. This would add to the administrative burden and would compound the possible financial loss to the state and conceivably to employers whose rates would be affected.

In support of their argument on due process plaintiffs rely principally on two cases, *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, and *Kelly v. Wyman,* 294

F.Supp. 893.[2] Defendants submit that neither *Sniadach* nor the welfare cases exemplified by *Kelly* are in point.[3]

In the *Sniadach* case the court attacked the garnishment procedure as a particularly pernicious weapon used against the helpless poor. The wage earner whose wages are attached is in a severe economic squeeze: because he is employed he is eligible neither for welfare nor for unemployment insurance benefits. Moreover, his wages may be frozen for an inordinately long period as he awaits a trial and a decision in the civil courts.

The *Sniadach* situation is not present here. While creditors may send notices to the claimant, no weapon such as garnishment is available for use by the creditors or by collection agencies. Expeditious administrative procedures, not available in *Sniadach*, are provided here.[4] Wel-

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2. The decision in *Kelly* is by no means final. In citing this case plaintiffs failed to include in their citation the fact that the United States Supreme Court has noted probable jurisdiction. 394 U.S. 971.

3. Defendants are appalled at plaintiffs' brazen misrepresentation to this Court concerning the holding in *McCullough v. Terzian*, 275 A.C.A. 745. In the latter case an attack was made on the type of hearing afforded a welfare recipient prior to termination of benefits to him. The superior court agreed with the petitioners that the procedure did not satisfy due process requirements and hence, was invalid. *Alameda County Superior Court*, Judgment entered May 2, 1968, No. 379011. The appellate court, however, *reversed* the lower court decision. The appellate court stated at page 753,

> "We conclude that the regulations do comport with the due process clause of the United States Constitution."

Plaintiffs' statement on page 10 of their brief, lines 26-29, that the holding in *McCullough* is similar to the holding in the *Kelly* case is totally false and in fact, directly contrary to what the *McCullough* court decided.

4. In the Oakland office of the Department, where these cases were brought, 66% of all cases appealed during October 1969 were decided within 45 days of the date the appeal was filed. By contrast, a typical waiting period for the hearing of a civil case in the Oakland Superior Court is 18-19 months. (This figure was supplied by the Calendar Clerk of the Alameda County Superior Court.)

fare benefits, apparently unavailable in *Sniadach,* are paid to the claimants here.

In a recent welfare case, *Wheeler v. Montgomery,* now pending before the United States Supreme Court (October Term, Nos. 14 and 62) an attack was made on the procedure of terminating welfare benefits prior to affording a welfare recipient a full scale hearing. The plaintiffs in that case, as here, relied on the *Sniadach* case for their argument that the hearing should precede termination of benefits. In distinguishing *Sniadach* the U. S. Solicitor General wrote as follows,

> "The present case is therefore unlike *Sniadach v. Family Finance Corp.,* 395 U.S. 337, where the Court invalidated, under the Due Process Clause of the Fourteenth Amendment, a State procedure by which wages could be garnished without prior notice to or opportunity for hearing for the wage earner. The key to that decision was that '[w]e deal here with wages—a specialized type of property presenting distinct problems in our economic system' (p. 340). Both the majority opinion and the concurring opinion of Mr. Justice Harlan made plain that the State procedure was invalid because garnishment involves the immediate taking of a wage earner's 'property'; and the Court stated (p. 339) that although '[s]uch summary procedure may well meet the requirements of due process in extraordinary situations,' [fn. omitted] garnishment by a wage earner's creditor was not such a situation. In the present case, however—as in cases involving government employment, licenses, and other benefits commonly dealt with through the administrative process—the recipients have no property (in the classic sense) of which the government is seeking to deprive them. In cases involving the question what procedural due process required in this 'property'-less context, this Court has several times indicated that the answer permissibly varies with the proceeding and private

interests concerned. [fn. omitted] *E.g., Hannah v. Larche,* 363 U.S. 420, 440; *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894-895.

"The present statistics show that substantially more ineligible than eligible individuals request 'fair hearings'. [fn. omitted] Moreover, if plaintiffs prevail, both the number and proportion of ineligible individuals requesting fair hearings might increase. Such a change might reflect either a substantial degree of use of 'fair hearing' requests as a means of prolonging benefit payments for individuals who clearly are no longer eligible, or, as the appellant in No. 62 suggests in his brief, pp. 13-17, the efficient functioning of the relatively new pre-hearing notice-and-conference techniques. In either case, the argument for 'fair hearing' prior to termination or reduction of benefits would be even less strong than it is now." Amicus Brief of the United States, pp. 28-30.

And in this action the *Sniadach* case has even less relevance than it does to the welfare situation. In *Wheeler* the claimant had already been receiving benefits and the question concerned termination. Cutting off benefits to a person who has adjusted to receiving them is a more profound blow than withholding compensation upon an initial application, as is factually the case here.

Plaintiffs also cite *Kelly v. Wyman,* 294 Fed. Supp. 893. In that case the plaintiffs would have been literally destitute without welfare payments. Once such payments were cut off, presumably the recipients would have absolutely no source of income whatever. They suffered from what the court termed a "brutal need". Plaintiffs here have admittedly suffered considerable inconvenience but they are, however, receiving welfare benefits. True these benefits are modest, but plaintiffs are only asked to maintain themselves on such a modest scale for approximately 30 to 45 days,

during which a decision on the appeal is being made. Moreover, the inconvenience suffered by plaintiffs here cannot be equated with the type of desperate need describd in *Kelly*. Indeed the court itself in the *Kelly* case acknowledged that differences in the degree of hardship may affect the question of a timing of the hearing. 294 Fed. Supp. at 901, fn. 20.

One further factor which distinguishes the unemployment insurance situation from the welfare cases is that in the latter a showing of need is a prerequisite to eligibility for welfare payments. As we have pointed out, *supra*, pp. 9-10, no such showing is required in the unemployment insurance area.

It is singularly inappropriate for plaintiffs to invoke *Kelly* since the *Kelly* court noted that its requirement of prior hearing would not necessarily apply to other areas of social security administration. 294 Fed. Supp. at 901, fn. 20.

On pages 12 through 15 of their brief, in addition to discussing the recoupment procedures available to the state, plaintiffs maintain that the procedure here is a summary one and that the factual circumstances of this case do not bring it within those for which summary procedures have traditionally been permitted.

This case does not involve a summary procedure. Plaintiffs have not had any property, goods, license, or the like which can be abruptly seized or terminated by the state. The failure to pay benefits after a preliminary determination is not within the class of cases which have traditionally been described as involving summary procedures.

Once more, however, we may assume arguendo that a summary procedure is in fact involved here. Even so, the procedures here do not offend due process. On page 13

plaintiffs state categorically that summary procedures are permitted only when health, safety or well-being of third persons may be affected. The argument is that in the case here the state is not protecting public health or well-being, only public monies, and that this consideration is insufficient to justify the withholding of benefits.

Plaintiffs are doubly in error. First, the safeguarding of public monies may well justify summary procedures. In the field of taxation, for example, taxes may be collected without prior hearing. Internal Revenue Code, 26 U.S.C., 6861-6864. This has been justified on the basis that "taxes are the lifeblood of government and their prompt and certain availability an imperious need." *Bull v. U.S.*, 295 U.S. 247 at 259 (quoted with approval in *In re Quakertown Shopping Center, Inc.*, 366 Fed.2d 95). The procedure has withstood due process attacks. *Phillips v. Commissioner*, 283 U.S. 589; *U.S. v. Plotkin*, 239 Fed. Supp. 129.

Second, these tax cases demonstrate not only that safeguarding of public funds is a valid consideration, but also that summary procedures are not restricted to cases such as dangerous foods and drugs. Perhaps the closest analogy is the Old Age Survivors Disability Insurance situation where, as the *Kelly* court pointed out, 294 Fed. Supp. 893, 901, fn. 20, benefits may be suspended without prior hearing. 42 U.S.C. 403(h)(3). See also *Flemming v. Nestor*, 363 U.S. 603. *Cf. Escobedo v. State of California*, 35 Cal.2d 870; *Orr v. Superior Court*, 71 A.C. 233, concerning suspension of driver's license without prior hearing.[5]

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5. It is interesting that *Escobedo* and *Orr* were both discussed in *McCullough v. Terzian*, 275 A.C.A. 745, cited by plaintiffs, with the court specifically noting that those two cases did not involve health and safety.

V

A STAY OF BENEFITS PENDING APPEAL DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Plaintiffs' argument that they are being deprived of equal protection is specious and unconvincing. The argument is that when a claimant is initially ruled ineligible the state implements that determination by withholding payment, but that when the claimant is ruled eligible, the state does not implement the determination and hence the claimant is deprived of equal treatment under the law. This analysis is absurd. Would plaintiffs contend that a plaintiff in an ordinary civil suit for damages who prevails at the trial level is entitled to be paid immediately by defendant despite the taking of an appeal? Under our system of law, waiting periods pending the determination of various types of appeal are common and cannot be said to be discriminatory.

The Legislature has created no unreasonable classification here. While any appeal is pending, whether by the employer or by the claimant, no benefits are paid. This rule is applied indiscriminately and does not turn on which party received a favorable preliminary ruling.

Plaintiffs' statement on page 16 of their brief is misleading and inaccurate. At lines 4-7 plaintiffs state,

> "In contrast, when the Department determines that the claimant is eligible for benefits and *commences payment*, and the employer appeals, the Department's ruling is not given effect." (Emphasis added.)

First, the Department should *not* commence payment following the initial determination.[6] Hence plaintiffs' suc-

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6. Apparently plaintiffs did receive one or two payments. This does not appear to be justified under the statute and the Department's practice in this regard is currently under review. Defendants' arguments in this memorandum are predicated on such payments not being made.

ceeding statement concerning deprivation of payment is misplaced. The fact is that no final determination has been made that the claimant is entitled to any benefits at all. The claimants, therefore, cannot be said to be "deprived" of payments until a determination has been made that they are entitled to them.

Second, during the period which concerns us here — the time between initial determination and decision by the referee — the claim is treated the same whether the claimant wins or loses: he does not receive benefits until the referee makes his determination. It is true that after the referee's decision the claimant may be treated differently, but this difference operates to his benefit. If he has initially been ruled ineligible but this decision is reversed by the referee, the claimant does not receive benefits until the employer's appeal to the Appeals Board is decided. If, on the other hand, a claimant was initially ruled eligible and the referee affirms this ruling then the claimant receives benefits immediately, as was the case with the claimant Hudson. Apparently, it was felt by the Legislature that in cases of two affirmances of the claimant's eligibility, his chance of ultimately prevailing was sufficiently great to justify paying him on an interim basis. See *Abelleira v. District Court of Appeal,* 17 C.2d 280, 298-299. This action is reasonable, and, as stated earlier, redounds to the benefit of the employee.

VI
CONCLUSION

Plaintiffs argue that the California plan is not in conformity with the relevant federal statutes. Defendants maintain that no such lack of conformity exists and that in any event, plaintiffs have failed to join the Secretary of Labor, who is an indispensable party to this action. The interests

of employers of the State of California is also manifest and the action cannot proceed unless they too are joined as parties.

Concerning the constitutional arguments, plaintiffs have sought to lump the welfare cases together with unemployment insurance law. The two, however, are not similar since the criterion of need, a critical factor in a welfare situation, is irrelevant to eligibility for unemployment insurance benefits. The short delay incident to an appeal assures fairness to affected employers and is a reasonable procedure adopted by the Legislature.

For the reasons stated defendants respectfully submit that the complaint should be dismissed.

Dated: 12-5-69.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General

/s/ ASHER RUBIN
Asher Rubin
Deputy Attorney General
Attorneys for Defendants

The following are the states whose unemployment insurance laws make provision for suspension of benefits during the pendency of appeal:

1. Alabama—Section 216(D)
2. Alaska—Section 23.20.340(e)-(g)
3. Arizona—Section 23-773(B)
4. Arkansas—Section 81-1107(e)
5. Colorado—Section 82-5-2(2)
6. Connecticut—Section 31-241
7. Delaware—Section 3318(b)
8. District of Columbia—Section 46-311(b)
9. Florida—Section 443.07(5)
10. Georgia—Section 6(b)
11. Hawaii—Section 383-43

12. Idaho—Section 72-1368(j)
13. Illinois—Section 704, 706
14. Indiana—Section 1802
15. Iowa—Section 96.6(2)
16. Kansas—Section 44-709(b)
17. Kentucky—Section 341.420(3)
18. Louisiana—Section 1635
19. Maine—Section 1194(2), (3)
20. Maryland—Section 7(i)
21. Massachusetts—Section 39
22. Michigan—Section 32(c), (d)
23. Minnesota—Section 268.10(2)(1)
24. Mississippi—Section 7381
25. Missouri—Section 288.070(b)
26. Montana—Section 87-107(b)
27. Nebraska—Section 48-644
28. Nevada—Section 612.465
29. New Hampshire—Section 282.5(B)(7)-(10)
30. New Jersey—Section 43.21-6(b)(1)
31. New Mexico—Section 59-9-6(b)
32. New York—Section 598
33. North Carolina—Section 96-15(b)(2)
34. North Dakota—Section 52-06-29
35. Ohio—Section 4141.28(G)(H)
36. Oklahoma—Section 216(e)
37. Oregon—Section 657.265(2), (4)
38. Pennsylvania—Section 501(e)
39. Puerto Rico—Section 5(h)
40. South Carolina—Section 68-155
41. South Dakota—Section 61-7-5, 61-7-11
42. Tennessee—Section 50-1325(B)
43. Texas—Section 6(b)
44. Utah—Section 35-4-6(e)
45. Virginia—Section 60.1-61
46. West Virginia—Section 11
47. Wisconsin—Section 108.09(6)(d)
48. Wyoming—Section 27-27(E)

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

AFFIDAVIT

I, George Roche, the undersigned, having been duly sworn, do depose and state that:

1. I am the Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California; and I have, in my possession and under my control, the statistical records of the said Department of Human Resources Development relating to unemployment insurance claims filed, eligibility and disqualifications considered and the outcome thereof, appeals filed to referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals, and the amount of unemployment insurance benefits paid by said Department from the Unemployment Fund.

2. The statistical records of the Department of Human Resources Development indicate the following claims, referee appeals, and benefit activity for the calendar year 1968:

A. The total number of claims filed was 960,180.

B. 141,956 of these claims were determined invalid because the claimants had insufficient wages in their base periods.

C. 818,224 of these claims were filed by claimants who had sufficient wages in their base periods to file valid claims.

D. There were 667,993 issues of eligibility for or disqualification from unemployment insurance benefits which resulted in written determinations by the Department.

E. Of the 667,993 issues of eligibility, 441,927 were determined by the Department in favor of the claimant while 226,066 resulted in the claimant being disqualified from receiving unemployment insurance benefits for one or more weeks.

F. In 1968, 45,353 appeals were filed to referees of the California Unemployment Insurance Appeals Board.

G. Referees in 1968 issued 26,509 decisions of which 5,526 were decisions on appeals by employers and 20,983 were decisions on appeals by claimants.

H. Of the 5,526 decisions on appeals by employers, the decision reversed the determination of the Department and held in favor of the employer in 2,602 cases or 47 percent of these decisions. The decision affirmed the determination of the Department and held in favor of the claimant in 2,924 cases or 53 percent of these decisions.

I. A total of $404.3 million was paid in unemployment insurance benefits.

3. If benefits had been paid to the claimants involved in the 2,602 cases in which the employer prevailed before the referee in 1968, the cost of such benefits to the Unemployment Fund would have been approximately $800,000 based upon a weekly benefit amount of $50 and an average duration prior to the referee decision of slightly in excess of six weeks.

4. The statistical records of the Department of Human Resources Development concerning the claims and appeals activity set forth in paragraph 2 hereof for the calendar years 1965, 1966, and 1967, and additional appeals activity for the calendar year 1968 is set forth in the table attached hereto.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ GEORGE ROCHE

State of California
County of Sacramento—ss.

George Roche being first duly sworn under oath, represents that he has subscribed to the foregoing affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 18th day of November, 1969.

/s/ SYDNEY R. JOHNSON
Notary Public in and for the State of California

[SEAL]

	1965	1966	1967	1968
No. of Claims Filed	1,116,074	1,011,489	1,029,897	960,180
No. of Claims Filed With Qualifying Wages	922,422	851,986	876,493	818,224
No. of Claims Filed Without Qualifying Wages	193,652	159,503	153,404	141,956
No. of Determinations on Eligibility	719,497	653,209	694,263	667,993
No. Favorable to Claimant	400,477	385,807	412,433	441,927
No. of Disqualifications Assessed	319,020	267,402	281,830	226,066
No. of Appeals Filed	40,165	37,527	43,184	45,353
No. of Appeals Withdrawn or Dismissed	9,342	9,850	11,454	10,632
No. of Decisions Issued	26,355	25,913	28,654	26,509
No. of Decisions on Appeals Filed by Employers	6,726	4,890	5,567	5,526
No. Favorable to Employer	3,400	2,201	2,432	2,602
No. Favorable to Claimant	3,326	2,689	3,135	2,924
No. of Decisions on Appeals Filed by Claimants	19,629	21,023	23,087	20,983
No. Favorable to Claimant	7,268	7,629	8,476	7,079
No. Favorable to Employer	12,361	13,394	14,611	13,904
Total Unemployment Insurance Benefits Paid (In Millions)	$533.7	$412.8	$458.7	$404.3

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.,
Plaintiffs,
vs.
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

AFFIDAVIT

I, J. E. McNeil, the undersigned, having been duly sworn, do depose and state that:

1. I am Chief of the Accounting Section of the Department of Human Resources Development of the State of California, and I have custody of the records relating to employers' unemployment insurance tax accounts.

2. I further certify that the best estimate of the difference in taxes payable by employers, in a year like 1968, based on the high and low wage bases and tax rates is as shown in the table below:

a. Taxes payable on
(1) $4,100 wage base..... $596.7 Million
(2) $3,800 wage base..... $568.7 Million
Difference ..... $ 28.0 Million

b. Balancing account taxes payable
(using $3,800 taxable wage base) at
(1) 1.0% general rate.....$191.0 Million
(2) 0.8% general rate.....$153.0 Million
Difference ..... $ 38.0 Million

c. Taxes payable (using $3,800 taxable wage base) on

(1) High rate schedule....	$377.6 Million	
(2) Low rate schedule....	$289.6 Million	
Difference		$ 88.0 Million
Total Difference		$154.0 Million

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. E. McNeil
J. E. McNeil

State of California
County of Sacramento—ss.

J. E. McNeil being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 19th day of November, 1969.

/s/ Sydney R. Johnson
Notary Public in and for
the State of California

[Seal]

Eugene M. Swann
Stephen P. Berzon
John Diaz Coker
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United States District Court
Northern District of California

No. C-69 350 ACW

Judith Java, et al.,
Plaintiffs,
vs.
California Department of Human Resources Development, et al.,
Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' BRIEF IN REPLY TO DEFENDANTS' ANSWER

I. *The Case Is Not Moot and Should Be Decided Here and Now*

Defendants contend that plaintiffs Java and Hudsons' suits are "moot" and that therefore, the action must be dismissed for mootness. Even assuming, *arguendo*, that Section 1335 of the Unemployment Code is not operating upon the named plaintiffs at this time, the action is not moot.

In a recent federal case, four Black juveniles brought a class action challenging segregation in the Florida reform schools. While the case was pending in federal district court, the named plaintiffs were released from the reform schools. The Court then dismissed the case on grounds of mootness. The Fifth Circuit reversed in *Singleton vs. Board of Commissioners,* 356 F.2d 771 (5th Cir., 1966) holding that the case was not moot as long as there remained "a subject matter on which the judgment of this Court can operate." So long as the schools were segregated, the court "could render an effective decree, responsive to the complaint." Similarly in *Buckner vs. School Board,* 332 F.2d 452 (4th Cir., 1964) and *McSwain vs. Board of Education,* 138 F. Supp. 570 (E. D. Tenn., 1956), two school desegregation cases in which named plaintiffs no longer were immediately involved in the outcome of the case, the courts held that the cases could not be dismissed on grounds of mootness. Justiceable controversies remained.

Similarly in the case at bar, "a subject matter on which the judgment of this Court can operate" remains—the State's practice under Section 1335 of suspending unemployment insurance benefits for which claimants have previously been found eligible, merely upon an appeal by an employer. This unlawful procedure continues to exist and is affecting scores of unemployment insurance claimants—members of plaintiffs' class—at this time. A "justiceable controversy" continues to exist and the issue of mootness is, in fact, not an issue at all.

If this Court were to hold the controversy moot because the referee has rendered a decision in the named plaintiffs' individual cases, it would be virtually impossible to challenge the constitutionality of the procedures required by Section 1335—ongoing procedures that affect thousands

of claimants each year. Since it is within the defendant's discretion to decide any individual case as promptly as it sees fit, any attack upon the stay provisions required by Section 1335 could be rendered "moot" by a quick determination of the named plaintiffs' claim for unemployment compensation benefits. For example, in the case at bar, plaintiff Hudson had not had a hearing before a referee on her employer's appeal at the time her complaint was filed. However, shortly after the filing of her complaint, a referee's decision was rendered. The fact remains that it might not be possible for a three-judge federal court to decide this important question before a decision in any given named plaintiff's case would be handed down by an appeals' referee.

In a recent case, *Carroll vs. President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968) the Supreme Court reviewed the constitutionality of a 10 day ex parte injunction, restraining petitioners from holding political rallies in defendant county. The county argued that the 10 days had expired and thus the case was moot as to petitioners. The Court held that the case was not moot because it was quite possible that other 10 day injunctions could occur in the future. The Court cited *Southern Pacific Terminal Co. vs. ICC,* 219 U.S. 498 (1911), in which the "Court declined to hold that the case was moot although the two-year cease-and-desist order at issue had expired. It said 'The questions in the orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . .'" 393 U.S. at 178-179.

Similarly in the case before this Court, it is clear that the stay provisions required by Section 1335 are presently

in effect and will be enforced against all future claimants. As in *Carroll, supra,* a determination that the case is moot might enable the important procedures in question to escape judicial review.

Moreover, while the personal interests of the named plaintiffs may have diminished, they have not terminated. Statistics inform us that it is not unlikely that plaintiffs Java and Hudson will again be claimants for unemployment insurance. In that role they may again be affected to their detriment by the automatic suspension of their benefits required by Section 1335. Such possibility of "future use" of unemployment insurance demands that plaintiffs be able to pursue their claim. See *Mitchell vs. United States,* 313 U.S. 80, 93 (1941); *Anderson vs. City of Albany,* 321 F.2d 649 (5th Cir., 1963). As Judge Wisdom pointed out in *Singleton,* 356 F.2d at 774, n. 4:

> "We note, however, that the nature of the public facility involved in this case demands liberal interpretation of future-use requirements. The plaintiffs point out the practical difficulty of ever getting a decision on the merits if present incarceration is a prerequisite, since at none of the Florida (reform) schools is the average sojourn of an inmate as long as the one year (and more) that often elapses between the filing of a complaint and the issuance of an order in the average desegregation suit." (Emphasis added)

As mentioned *supra,* similar practical difficulties would exist in obtaining a hearing on the legality of Section 1335 if this case were to be found moot.

Finally in *Kelly vs. Wyman,* 294 F.Supp. 887, 890 (S.D. N.Y., 1968), Judge Bryan noted:

> "Defendants urge that the case is moot, based on affidavits showing that most of the plaintiffs are now

receiving public assistance on an emergency basis. Judicial determination of questions of this importance cannot thus be evaded and, in any event, dismissal is not appropriate when the individuals purport to represent a class." (Emphasis added)

None of the cases cited by defendant on the issues of mootness involved or even resembled a class suit. In *Aetna Life Insurance Co. vs. Haworth,* 300 U. S. 227, 240 (1937), which involved a claim by the holder of an insurance policy, the Court held that an actual controversy existed between the insurer and the insured, notwithstanding the nonpayment of premiums. *Portland Web Pressmen's Union Local No. 17 vs. Oregonian Publishing Co.,* 286 F.2d 4 (9th Cir., 1960), Cert. denied, 366 U.S. 912, involved an action by a labor union to compel employers to submit a controversy between parties to arbitration. The Court held that the complaint sought a determination which could not alter either party's rights or remedies under their collective bargaining agreement and that, therefore, it failed to raise a justiceable question which could be the basis of declaratory relief. *Id* at 8. The final case cited by defendants in support of their contention of mootness involves an action to enjoin state segregation statutes as it affected a particular South Carolina park. *Clark vs. Flory,* 237 F.2d 597 (4th Cir., 1956). The court held that the controversy was moot because, while the action was pending, the state legislature enacted a statute providing that the park in question be closed to the public.

For the reasons stated above, this action is clearly not moot, and defendants' motion to dismiss on that ground should be denied.

II. *There Are No Indispensable Parties to This Action Other Than Those Already Named*

A. *The Secretary of Labor is not an indispensable party to this action.*

It is not true that a final decree cannot be rendered in this action without "radically and injuriously affecting the interest of the United States" or "without leaving the controversy in such a situation that its final determination may be incompatible with equity and good conscience." (Defendants' Brief, page 4) While it is true that the validity of each States' unemployment compensation scheme is dependent upon certification by the Secretary of Labor, it does not follow that because of this certification requirement, the Secretary is an indispensable party to this action. Plaintiffs are not seeking de-certification of the California Unemployment scheme, but merely an order enjoining one statutory provision in that scheme and requiring the continuation of unemployment benefits to claimants who have previously been determined eligible by the State until such claimants are found ineligible.

Certainly if Section 1335 were found unlawful, the Secretary of Labor would not be compelled to withdraw certification from California's unemployment insurance scheme. The federal statutes and corresponding federal regulations do not require stay provisions such as those found in Section 1335. Further, the unemployment compensation statutes of at least 2 States—Washington and Vermont—contain no provision whereby an eligible claimant's benefits are "stayed" pending the outcome of an appeal by the claimant's previous employer. The Secretary of Labor has certified Vermont's and Washington's statutes, and if California were ordered to eliminate its stay provisions, its certification would likewise remain unaffected.

In *National Welfare Rights Organization vs. Wyman*, 304 F.Supp. 1346, 1349-1350, (E.D.N.Y., 1969), Judge Weinstein reviewed a long list of welfare cases in which State welfare procedures, statutes, and regulations were challenged as contravening controlling federal authority and found that in such cases, neither the federal government nor the state were harmed for failure to include the appropriate federal agency as a party. In Judge Weinstein's words:

> "Nor will HEW be harmed by non-joinder. While it does have an arguable interest in the subject matter of this litigation since it is required to review each state plan to determine whether the plan complies with federal standards and those standards may affect the fiscal contribution of the federal government, HEW's absence will not 'as a practical matter' impair its ability to protect that interest or expose any of the existing parties to double or inconsistent liability." 304 F.Supp. at 1350.

Similarly, the Secretary of Labor is not an indispensable party in the case at bar.

B. *The employers of the State of California are not indispensable parties to this action.*

Without any substantial authority, the State urges dismissal on the ground that California's tens of thousands of employers are indispensable parties to this action. This motion is totally without merit.

The State's position is based on the premise that overpayment will sometimes result if the stay provided for under Section 1335 is eliminated, and that the State's employers will have to bear the responsibility for resources any financial deficit that may result. However, the State does not point out that an employer who is successful on

appeal suffers no harm if benefits have been paid to his former employee pending the appeal. Upon winning his appeal, the employer's unemployment compensation reserve account is immediately credited with all monies that have been paid to his former employee. It is the State's responsibility—*not the employer's*—to recoup all funds that have been paid previous to the appeal.

Nor is it likely that the State will suffer substantial losses due to overpayment if Section 1335 is overturned. As is pointed out in Section IV of this brief, the State has been endowed with ample recoupment powers by the Legislature.

Even assuming, *arguendo,* however, that the State will suffer some losses due to overpayments, it is not at all certain that employers' unemployment tax rates will need to be increased. At the State's current rate of economic growth, present unemployment tax rates should provide sufficient funds to cover any overpayment losses.

Moreover, if more funds are needed, the interests of the State's thousands of employers are not significantly greater than the interests of the State's hundreds of thousands of employees. For while unemployment funds are collected directly from employers, the burden is borne directly by their employees. Such funds are, of course, part of an employer's total labor cost and are reflected in his employees' wages. *See* Note, 73 YALE L. J. 357, 361 (1963). Likewise, the State's millions of consumers also have an interest in labor costs since such costs are directly reflected in consumer prices. Employers, employees, and consumers alike, therefore, all are affected by the possibility of increased taxes, costs, and prices, yet none have an interest so great or so certain as to be indispensable parties to this action. "One is not 'an indispensable party' merely because he has some interest in the subject matter of the litigation

. . . ." *Lubin vs. Chicago Title and Trust Co.*, 260 F.2d 411, 413 (7th Cir., 1958).

The possibility of future tax increases is not a sufficient basis for intervention of right. *Blocker vs. Board of Education*, 229 F.Supp. 714, 715 (E.D.N.Y., 1964). Nor is it a sufficient basis for indispensability. The defendant's motion to dismiss for failure to join the State's tens of thousands of employers as indispensable parties should be denied.

III. *The California Plan Fails to Provide Unemployment Compensation "When Due" In Contravention of Section 503(a)(1) Of The 1935 Social Security Act.*

Defendants state that plaintiffs are arguing "their obvious need as the basis for immediate receipt of unemployment benefits" (Defendant's Brief, p. 9, 26-28). This is not so. Certainly, plaintiffs agree that the legislative history clearly demonstrates that unemployment compensation benefits were intended to be paid as a matter of right and not as a matter of need. A corollary of that proposition is, of course, that need is irrelevant in the determination of an individual's claimant's application for benefits. Plaintiffs never have contended otherwise.

However, as plaintiffs' main brief points out (brief in support of Motion for Preliminary Injunction, pp. 2-7), the legislative history also reveals that Congress was very concerned with "need" when it passed the unemployment compensation statutes. It determined that individual and societal need was most critical during the crucial initial stages of unemployment, and consequently required that the right to unemployment insurance benefits vests at this stage. *S. Rep. No. 628*, 7th Cong., 1st Sess. 10-13 (1935); *H. R. Rep. No. 615*, 74th Cong., 1st Sess. 7-9 (1935).

Defendant has stated that the median length of time between the date of filing of an appeal and the date of

mailing an appeals decision in 1968 was 49 days. (Answer to Plaintiffs' Interrogatories, No. 15, p. 5). Plaintiffs' latest information reveals that in Alameda County, appeals filed on December 10, 1969, were not being heard by a referee until mid-February, 1970. The written decision takes two to three weeks longer. But even if we assume the 49 day figure is presently valid, literally thousands of claimants who have been determined eligible by the State for unemployment insurance receive no benefits during at least the first seven weeks of unemployment, if their previous employer decides to appeal.

Defendants indicate that this delay is not very serious because claimants are able to resort to welfare during this period. (Defendant's Brief, pp. 18, 20). This may be the position of the State of California but it runs directly counter to the position of the 1935 Congress when it enacted the federal unemployment statutes. Unemployment compensation was passed to "enable workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment *without having to resort to relief . . . .*" *H. R. Rep. No. 615,* 74th Cong., 1st Sess. p. 7 (1935). (Emphasis added) *See also S. Rep. No. 628,* 74th Cong., 1st Session 10-13 (1935). A scheme that drives eligible claimants to seek rather than avoid welfare does not provide unemployment compensation "when due" and violates Section 503(a)(1) of the Social Security Act of 1935.

Moreover, this time it is especially important that the will of the 1935 Congress in enacting Section 503(a)(1) be enforced. The legislative history makes it clear that a principal purpose of unemployment compensation was to stabilize consumer demand and business in the crucial incipient stages of an economic recession or depression. *S.*

Rep. at 10-13; *H. Rep.* at 7-9. It was intended "to maintain purchasing power, upon which business and industry are dependent." *H. Rep.* at 8. To accomplish this purpose, benefits must of course be made "due" at the initial stages of unemployment.

The unemployment rate is presently at its highest rate in recent years and is still increasing. As the unemployment rate increases, the *greater* the appeals back log will thicken. Thus the likelihood of delay under Section 1335 is strengthened. Such delay directly frustrates the primary purposes of unemployment compensation as expressed by the 1935 Congress. Section 1335 of the California Unemployment Code, which provides for delays in payment to eligible claimants, is therefore not in conformity with Section 503(a)(1) of the Social Security Act of 1935 and must be overturned.

IV. *The Automatic Stay of Benefits Pending an Appeal Violates Due Process*

Defendants assert that no "property right" accrues to a claimant as a result of an initial determination by the Department that he is eligible. A "preliminary determination relating to (his) eligibility" without an opportunity for his employer to be heard (Defendant's Brief, pp. 14-19). This is also not so. The claimant's previous employer is personally contacted by the claims interviewer prior to a determination on nearly every claim. This procedure includes communication with the employer on several occasions in complex cases. The employer is given the opportunity to rebut all facts stipulated by the claimant. Only after the substance of a claim is thoroughly investigated is a determination made.

Clearly unemployment benefits are a property right within the meaning of the Due Process Clause. The State

itself concedes that unemployment compensation is "a matter of right". (Defendant's Brief, p. 9). And once claimants are determined eligible for unemployment benefits, they can not be suspended merely upon the filing of an appeal by an employer without trampling on claimants rights to due process of law. See *Kelly vs. Wyman*, 294 F.Supp. 893 (S.D.N.Y., three judge court, 1968)[1] *Accord, Camerena vs. Department of Public Welfare*, 449 P.2d 957 (C.A., Ariz., 1969). *See also Sniadach vs. Family Finance Corp.*, 395 U.S. 337 (1969).

Defendants seek to distinguish *Kelly vs. Wyman, supra*, on the ground that the "brutal need" in *Kelly* is absent from the unemployment compensation situation inasmuch as unsuccessful claimants can, as a matter of course, fall back on welfare assistance.[3] But this is simply not so. Welfare is usually not available for interim relief. As in *Kelly*, "brutal need" is often present.

Welfare is not available to single employable males between ages 20 and 45 in most counties. Moreover, in order to qualify for welfare assistance, a claimant with a family must come within the requirements of one of the categorical aid programs, of which there are four: Old Age Assistance; Aid to the Disabled; Aid to the Blind; and Aid to Families with Dependent Children. *Cal. W & I Code* Section 11200; 11200; 12500; 13500. Since a claimant would have to be of retirement age, disabled, or blind to qualify for the first three, they can be disregarded. In order to qualify for the fourth, the claimant's family must have less than $600 in

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1. *Kelly* was argued before the Supreme Court on October 13, 1969 and is presently awaiting decision. The case's present title is *Goldberg vs. Kelly*.

3. As discussed in Section III of this brief, defendants ignore the fact that the express purpose of the federal unemployment statutes was to obviate the need for welfare assistance.

personal property. *Cal. W & I Code* Section 11255. The claimant with a family therefore, must divest himself of nearly all of his assets before he can be eligible for the receipt of welfare benefits.

Defendants also cite the case of *Abelleira vs. District Court of Appeals,* 17 C.2d 280 (1941) as justification for the stay provisions of Section 1335. (Defendant's Brief, pp. 16 & 17). The basic premise of the *Abelleira* court was that the first appeal was "ordinarily decided in a short period of time." 17 C.2d at 290. *Abelleira* was decided in 1941. At the time of the decision there were far fewer appeals filed by employers. For example, in 1953,[2] twelve years after *Abelleira,* 1,943 employers filed appeals to initial determinations in favor of claimants. In 1964 there were 7,328 such appeals—representing over a 350% increase in appeals by employers. In 1969 the number of employer appeals numbered 5,526. (see statistics attached to answers to interrogatories). These statistics indicate a sizable increase in the case load of the Department in the 29 years since *Abelleira* with a consequent increase in paperwork and in procedural delays. In 1968 the median length of time between the date of filing and the date of mailing of an appeals decision was 49 days.

Chief Justice Gibson wrote in *Abelleira:*

> "The very essence of the act is its provision for the prompt payment of benefits to those unemployed . . . Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided . . ." 17 C.2d at 298

Plaintiffs submit that the present period of delay in the payment of benefits upon an employer's appeal neither

2. The statistics of the Human Resources Development Department go back only as far as 1953.

existed nor was contemplated in 1941 when *Abelleira* was decided. We are no longer dealing with "a short period of time," but a significant number of weeks and even months in an unemployed person's life. If the court in *Abelleira* had been confronted with a lengthy period of delay, it is not unreasonable to assert that it would not have condoned the stay provisions of Section 1335.

Finally, defendants contend that "overwhelming considerations" justify Section 1335—the need to prevent loss from overpayments. Defendants cite Section 1375 of the Unemployment Code and urge that the statute precludes the recovery of overpayment inasmuch as they would be "waived because they would have been received without fault on the part of the recipient, and . . . recovery would be against equity and good conscience." (Defendant's Brief, p. 12).

However, in raising Section 1375, the State makes no reference to its decisions interpretating this statute. Under these cases, the Department is not precluded by Section 1375 from recovering the great bulk of its projected overpayments. The most recent expression of the California Unemployment Insurance Appeals Board on the interpretation and effect of Section 1375 makes it clear that the amount of *fault* on the part of the claimant that must be established in order to recover an overpayment is *no more than an innocent misinterpretation of law.* California Unemployment Insurance Appeals Board, *In the Matter of Eveard A. Goding* (July 15, 1969) Precedent Benefit Decision No. P-B-47. In *Goding,* the claimant was dismissed by his employer and became eligible for unemployment insurance. He appealed the discharge to his labor union and was subsequently reinstated to his job by the labor arbitrator, and awarded back wages *less what he had al-*

ready received in unemployment compensation. The Department claimed that the benefits it paid out to the claimant constituted an overpayment. Although the Board of Appeals expressly found that "the claimant in this matter was free from misrepresentation, wilful nondisclosure or fraud," he was still held liable for repayment of the amount overpaid. (*Id.* at 7.) His only fault consisted of his and *his union's* error in interpretating the meaning of Section 1265 of the Code, which regulates the receipt of supplemental unemployment compensation in cases in which the employer has a supplemental private insurance plan. As to the limitation on the collection of overpayments where "equity and good conscience" would be offended, the Appeals Board in *Goding* refused to waive the overpayment despite the fact that the claimant's award for back wages was specifically reduced by the amount of unemployment benefits. Section 1375 did not deter recovery despite the hardship involved and the claimant's lack of fraudulent intent.[4]

Furthermore, a decision by an appeals referee in favor of an employer usually involves an automatic finding of fault on the part of an employee. The great bulk of appeals by employers of decisions in favor of their former employees arise from Section 1253, 1256, and 1257 of the Unemployment Code. These require that the claimant be able and available for work if offered, that he not have resigned from his last employment without good cause, that he not have been fired for misconduct, and that he made no misrepresentations to secure benefits. A finding adverse to the claimant on any of these issues presupposes fault on the part of the claimant who obtains benefits by

4. For similar results, see California Unemployment Insurance Appeals Board Benefit Decision No. 5960, and Miscellaneous Decision No. 431.

violating the provisions thereof. Hence, in most cases, Section 1375 does not apply and the claimant automatically becomes liable for the overpayment.[5]

No "overwhelming considerations," therefore justify the suspension of unemployment benefits from eligible claimants without a prior hearing. Section 1335 is unconstitutional under the Due Process clause and must be enjoined.

V. *Conclusion*

For the reasons stated above, and in plaintiffs' Brief in Support of a Preliminary Injunction, defendant's motions to dismiss should be denied and plaintiffs' motion for a preliminary injunction should be granted. Section 1335 of the California Unemployment Insurance Code violates the Social Security Act of 1935 and the Due Process Clause of the Fourteenth Amendment, and its enforcement should be enjoined.

Respectfully submitted,

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: JAMES M. KLEIN /s/
James M. Klein

5. As discussed on p. 14 of Plaintiffs' main brief, the State has ample recoupment powers including criminal sanctions under Section 2101 and 2113 of the Unemployment Code.

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Contra Costa Legal Services Foundation
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In the United States District Court
Northern District of California

No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

INTERROGATORIES BY PLAINTIFFS

The plaintiffs pursuant to Rule 33, Federal Rules of Civil Procedure (28 U. S. C. A.) require the defendants, CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT and its Director, GILBERT SHEFFIELD, to fully answer the following interrogatories:

1. Subsequent to January 1, 1969, how many claimants have applied for unemployment compensation benefits?

2. Subsequent to January 1, 1969, how many claimants for unemployment compensation benefits have been found eligible for such benefits?

3. Subsequent to January 1, 1969, how many claimants for unemployment compensation benefits whose employers have filed formal protests have subsequently been determined eligible for such benefits?

4. Subsequent to January 1, 1969, how many employers have filed appeals to eligibility determinations that were made in favor of claimants?

5. Subsequent to January 1, 1969, what has been the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 4, between the day that an appeal has been filed by an employer and the day that the final decision by the appeals referee on the appeal has been rendered and recorded?

6. Subsequent to January 1, 1969, what has been the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 4, between the day that an appeal has been filed by an employer and the day that a fair hearing has been held on the appeal?

7. Subsequent to January 1, 1969, what has been the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 4, between the day that the fair hearing referred to in interrogatory 6 has been held and the day that the final decision by the appeals referee on the appeal has been rendered and recorded?

8. Subsequent to January 1, 1969, how many of the appeals by employers referred to in interrogatory 4 have been successful on the merits? (i.e. how many eligibility determinations in favor of employees have been reversed on appeals by employers?)

9. Subsequent to January 1, 1969, how many employees filed appeals of eligibility determinations that they were not eligible for unemployment benefits?

10. Subsequent to January 1, 1969, how many of the appeals by employees referred to in interrogatory 9 have been successful? (i.e. how many eligibility determinations that employees were not eligible for benefits have been reversed on appeal?)

11. Between January 1, 1968 and December 31, 1968, how many claimants applied for unemployment compensation benefits?

12. Between January 1, 1968 and December 31, 1968, how many claimants for unemployment compensation benefits were found eligible for such benefits?

13. Between January 1, 1968 and December 31, 1968, how many claimants for unemployment compensation benefits whose employers had filed formal protests were subsequently determined eligible for such benefits?

14. Between January 1, 1968 and December 31, 1968, how many employers filed appeals to eligibility determinations that were in favor of claimants?

15. Between January 1, 1968 and December 31, 1968, what was the median length of time (week days and weekend days included) for all appeals referred to in interrogatory 14, between the day that an appeal was filed by an employer and the day that the final decision by the appeals referees on the appeal was rendered and recorded?

16. Between January 1, 1968 and December 31, 1968, what was the median length of time (week days and weekend days included), for all appeals referred to in interrogatory 14, between the day that an appeal was filed by an employer and the day that a fair hearing was held on the appeal?

17. Between January 1, 1968 and December 31, 1968, what was the median length of time (week days and week-end days included) for all appeals referred to in interrogatory 14, between the day that the fair hearing referred to in interrogatory 16 was held and the day that the final decision by the appeals referee on the appeal was rendered and recorded?

18. Between January 1, 1968 and December 31, 1968, how many of the appeals by employers referred to in interrogatory 14 were successful? (i.e. how many eligibility determinations in favor of employees were reversed on appeals by employers?)

19. Between January 1, 1968 and December 31, 1968, how many employees filed appeals of eligibility determinations that they were not eligible for unemployment benefits?

20. Between January 1, 1968, and December 31, 1968, how many of the appeals by employees referred to in interrogatory 19 were successful? (i.e. how many eligibility determinations that employees were not eligible for benefits were reversed on appeal?)

21. Has the Department compiled any reports regarding any of the aforementioned matters in 1967, 1968 or 1969? (i.e. number of claims for unemployment benefits, number of claimants initially found eligible, number of protests filed by employers to these claims, number of appeals filed by employers of eligiblity determinations in their employees' favor, number of days between the filing of such appeals and the rendering of final decisions by appeals referees on the appeals, number of employer appeals that result in affirmances and number of employer appeals that result in reversals, number of appeals filed by employees of eligi-

bility determinations that they are ineligible for benefits, number of employee appeals that result in affirmances and number of employee appeals that result in reversals?)

22. If the answer to interrogatory 21 is yes, list the full title of each such report compiled in 1967, 1968, and in 1969.

Dated: November 24, 1969.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: STEPHEN P. BERZON /s/
Stephen P. Berzon
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Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development,
Defendants.

SUPPLEMENTAL INTERROGATORIES BY PLAINTIFFS

The plaintiffs pursuant to Rule 33, Federal Rules of Civil Procedure (28 U. S. C. A.) require the defendants, CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT and its Director, GILBERT SHEFFIELD, to fully answer the following interrogatories:

1. For the week February 8, through 14 inclusive, only, how many appeals were filed by employers from benefit determinations in favor of the claimant, whenever made, in the referee offices of Oakland, San Francisco, Los Angeles, and San Diego?

2. During what week, or weeks, is each of the appeals referred to in interrogatory No. 1 scheduled to be heard by a referee?

3. For the week February 15 through 21 inclusive, only, how many appeals were filed by employers from benefit determinations in favor of the claimant, whenever made, in the referee offices of Oakland, San Francisco, Los Angeles, and San Diego?

4. During what week, or weeks, is each of the appeals referred to in interrogatory No. 3 scheduled to be heard by a referee?

5. For all appeals referred to in interrogatories Nos. 1 and 3, what is the median, and arithmetic mean, number of days (week-end days included) between the date said appeals are filed, and the date now scheduled to be heard before a referee, not counting the day filed, and counting the day heard?

6. For all appeals filed by employers from benefit determinations in favor of the claimant during the year 1941, what is the median, and arithmetic mean, number of days (weekend days included) between the dates said appeals were filed, and the dates actually heard by a referee, not counting the date filed, and counting the date heard?

7. For all appeals filed by employers from benefit determinations in favor of the claimant during the year 1953, what is the median, and arithmetic mean, number of days (weekend days included) between the dates said appeals were filed, and the dates actually heard by a referee, not counting the date filed, and counting the date heard?

8. For all appeals filed by employers from benefit determinations in favor of the claimant during the year 1954, what is the median, and arithmetic mean, number of days (weekend days included) between the dates said appeals were filed, and the dates actually heard by a referee, not counting the date filed, and counting the date heard?

9. For the calendar year 1968, what was the median, and the arithmetic mean, number of weeks of benefits received by all claimants for unemployment insurance, per claimant?

10. For the calendar year 1968, what was the median, and the arithmetic mean, number of weeks of benefits received by only those claimants who prevailed in appeals by employers from initial determinations in favor of the claimant, per claimant?

11. For calendar 1969, what was the median, and arithmetic mean, number of weeks of benefits received by all claimants for unemployment insurance, per claimant?

12. For calendar 1969, what was the median, and arithmetic mean, number of weeks of benefits received by only those claimants who prevailed in appeals by employers from initial determinations in favor of the claimant, per claimant?

13. For the calendar year 1968, in how many of the appeals by employers from benefit determinations in favor of the claimant, where the employer prevailed, did the claimant fail to appear for the hearing before the referee?

14. For the calendar year 1968, in how many of the appeals by employers from initial determinations in favor of the claimant, where the claimant prevailed, did the claimant lose benefits, to which he would have otherwise been entitled, by failing to continue reporting to the employment office pending the referee's decision thereon?

15. For the calendar year 1969, in how many of the appeals by employers from benefit determinations in favor of the claimant, where the employer prevailed, did the claimant fail to appear for the hearing before the referee?

16. For the calendar year 1969, in how many of the appeals by employers from initial determinations in favor of the claimant, where the claimant prevailed, did the

claimant lose benefits, to which he would have otherwise been entitled, by failing to continue reporting to the employment office pending the referee's decision thereon?

17. For the calendar year 1968, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment, was the employer represented by an attorney or other professional counsel, including independent firms engaged in the business of providing expert representation in regard to unemployment insurance matters?

18. For the calendar year 1969, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment, was the employer represented by an attorney or other professional counsel, including independent firms engaged in the business of providing expert representation in regard to unemployment insurance matters?

19. For calendar 1968, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment was the employee represented by either an attorney, a union official, or other professional counsel?

20. For calendar 1969, in what percentage of all appeals, including both those filed by the employer, those filed by the employee, and those initiated by the then Department of Employment was the employee represented by either an attorney, a union official, or other professional counsel?

Dated: February 24, 1970.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: JOHN DIAZ COKER /s/
John Diaz Coker
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Filed Dec. 22, 1969

In the United States District Court for the Northern District of California

Civil Action No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually, and as Director of the California Department of Human Resources Development,
Defendants.

ANSWER TO INTERROGATORIES

The defendants answer the Interrogatories served on them by mail received November 25, 1969, as follows:

INTERROGATORY NO. 1:

Between January 1, 1969 and September 30, 1969, 768,445 claimants have filed new claims for unemployment insurance benefits.

INTERROGATORY NO. 2:

The department does not maintain records pertaining to the precise information asked for by Interrogatory No. 2. However, the department can provide the following statistics. Between January 1, 1969 and September 30, 1969, 669,162 new claims were filed by claimants found by the department to possess qualifying wage credits. In this same period, the department issued 513,590 determinations on eligibility. 295,276 of these determinations were favorable to the claimant. This figure represents the number of determinations and does not distinguish those instances in which more than one determination was made with respect to one particular claimant. In this same period, approximately 683,603 claimants were paid benefits, which figure includes some individuals filing new claims in the previous year of 1968. 505,796 were first payments on new claims. However, not all the individuals in this group necessarily filed new claims in 1969.

INTERROGATORY NO. 3:

Between January 1, 1969 and September 30, 1969, 50,857 claimants whose last employer filed protests were subsequently determined to be eligible for benefits.

INTERROGATORY NO. 4:

The department does not maintain records indicating the total number of all employer appeals, but only those which result in a decision. Between January 1, 1969 and September 30, 1969, 4,159 appeals to a referee were filed by employers which resulted in a decision. During this same period, 7,580 appeals were either dismissed or withdrawn, but no information is available to identify the number of these appeals attributable to an employer.

INTERROGATORY NO. 5:

The department does not maintain information reflecting the median length of time for all appeals filed by an em-

ployer, as distinguished from claimant appeals. However, the department can provide the following information. The median length of time between the date of filing and the date of mailing of the decision, or dismissal, for all referee cases for the period between January 1, 1969 and September 30, 1969 is 40.5 days.

INTERROGATORY NO. 6:

The department does not maintain records pertaining to the information sought by Interrogatory No. 6. However, note the answer to Interrogatory No. 7.

INTERROGATORY NO. 7:

The department does not maintain records pertaining to employer appeals as distinguished from claimant appeals. Nor does the department maintain records reflecting the information sought by Interrogatory No. 7 with respect to all appeals. However, based upon a sample of 1,526 cases of appeals by both claimant and employers, between January 1, 1969 and September 30, 1969, the median length of time elapsing between the hearing date and the mailing of the referee decision was seven days. This figure does not include dismissals.

INTERROGATORY NO. 8:

The records maintained by the department do not pertain to all appeals filed by an employer, but only those which result in a decision. However, of the 4,159 appeals filed by an employer between the period of January 1, 1969 through September 30, 1969, which resulted in a decision, 2,023 resulted in decisions which were favorable to the employer.

INTERROGATORY NO. 9:

The department does not maintain records reflecting the number of claimants appeals; rather, the department's records reflect only the number of appeals to referees filed by claimants which resulted in a decision. For the period of January 1, 1969 through September 30, 1969 this figure is 14,768.

INTERROGATORY NO. 10:

Of the 14,768 appeals to referees filed by claimants between January 1, 1969 and September 30, 1969 which resulted in a decision, 4,838 resulted in decisions which were favorable to the claimant.

INTERROGATORY NO. 11:

Between January 1, 1968 and December 31, 1968, 960,180 claimants filed new claims for unemployment insurance benefits.

INTERROGATORY NO. 12:

While the department does not maintain records reflecting the precise information sought by Interrogatory No. 12, it can make the following statement. In the year 1968, 818,224 new claims were filed by claimants with qualifying wage credits. Between January 1, 1968 and December 31, 1968 the department made 667,993 determinations on eligibility. 401,927 of these determinations were favorable to the claimant. It must be pointed out that this figure does not indicate the number of claimants involved in the 401,927 determinations. In this same period, approximately 824,361 claimants were paid benefits, of which approximately 623,976 were first payments on new claims. However, not all the individuals in this group necessarily filed new claims in 1968.

INTERROGATORY NO. 13:

Between January 1, 1968 and December 31, 1968, 70,414 claimants whose last employer had filed a protest were determined to be eligible for benefits.

INTERROGATORY NO. 14:

The department does not maintain records indicating the total number of appeals filed by employers to determinations of eligibility in favor of claimants; rather, it maintains records only of those employer appeals which result in a decision. Between January 1, 1968 and December 31, 1968, 5,526 appeals to referees were filed by employers which resulted in a decision.

INTERROGATORY NO. 15:

The department does not maintain the specific information sought by Interrogatory No. 15 with respect to appeals filed by an employer rather than a claimant. However, for all referee cases for the period of January 1, 1968 to December 31, 1968, the median length of time between the date of filing of the appeal and the date of the mailing of the decision or dismissal was 49 days.

INTERROGATORY NO. 16:

The department does not maintain the information sought by Interrogatory No. 16.

INTERROGATORY NO. 17:

The department does not maintain the information sought by Interrogatory No. 17.

INTERROGATORY NO. 18:

The department does not maintain information relating to the disposition of all employer appeals, but only to those

which result in a decision. Of the 5,526 appeals to referees filed by employers between January 1, 1968 and December 31, 1968, which resulted in a decision, 2,602 resulted in decisions which were favorable to the employer. It should be noted that it cannot be determined from the records maintained by the department how many claimants or employer appeals were involved in the 2,602 decisions since some decisions involve more than one claimant or employer appeal.

INTERROGATORY NO. 19:

The department's records reflect the results only of those claimants' appeals which result in a decision. Between January 1, 1968 and December 31, 1968, 20,983 appeals to referees were filed by claimants which resulted in a decision.

INTERROGATORY NO. 20:

Of the 20,983 appeals to referees filed by claimants between January 1, 1968 and December 31, 1968 which resulted in a decision, 7,079 resulted in decisions which were favorable to the claimant.

INTERROGATORY NO. 21:

Yes.

INTERROGATORY NO. 22:

The department maintains the following reports, copies of which are attached, pertaining to the information sought by Interrogatory No. 21:

1. New Claims Filed Against California, Years 1955-1969
2. New Claims With Qualifying Wage Credits—Total, Years 1955-1969

3. Rulings on Issues of Voluntary Quit and Misconduct Unfavorable for Most Recent Employer, Years 1955-1969
4. Decisions on Appeals to Referee Filed by Claimants (Number of Cases), Years 1955-1969
5. Decisions on Appeals to Referee Filed by Claimants Favorable (Number of Cases), Years 1955-1969
6. Decisions on Appeals to Referee Filed by Claimants—Unfavorable (Number of Cases), Years 1955-1969
7. Decisions on Appeals to Referee Filed by Employers (Number of Cases), Years 1955-1969
8. Decisions on Appeals to Referee Filed by Employers—Favorable (Number of Cases), Years 1955-1969
9. Decisions on Appeals to Referee Filed by Employers—Unfavorable (Number of Cases), Years 1955-1969
10. Appeals to Referee, Other Dispositions, Benefit Appeals Withdrawn or Dismissed (Number of Cases), Years 1955-1969
11. Nonmonetary Determinations—Total, Years 1955-1969
12. Number of First Payments Issued, Years 1955-1969
13. Benefit Disqualifications—Total, Years 1955-1969
14. Number of Unemployment Insurance Beneficiaries, Years 1965-1969

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Nicolo Pino
Nicolo Pino, Assistant
Chief Research and
Statistics

State of California
County of Sacramento—ss.

Nicolo Pino, being first duy sworn under oath does depose and state that:

1. He is the Assistant Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California and has in his possession and under his control the statistical records of the said Department of Human Resources Development relating to unemployment insurance claims filed, eligibility and disqualifications considered and the outcome thereof, appeals filed to referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals.

2. He has in his capacity as Assistant Chief of the Research and Statistics Section of the Department of Human Resources Development subscribed to the foregoing Answer to Interrogatories and does state that the information contained therein is true and correct to the best of his knowledge and belief.

/s/ Nicolo Pino
Nicolo Pino,
Assistant Chief
Research and Statistics

Subscribed and sworn to before me this 16th day of December, 1969.

/s/ Sydney R. Johnson
Notary Public in and for
the State of California
[SEAL]

[STATISTICAL CHARTS OMITTED]
Pages 104-118

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In the United States District Court for the Northern District of California

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Judith Java and Carroll H. Hudson, individually, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield, individually, and as Director of the California Department of Human Resources Development,

Defendants.

ANSWERS TO SUPPLEMENTAL INTERROGATORIES

The defendants answer the Supplemental Interrogatories dated February 24, 1970, as follows:

INTERROGATORY NO. 1

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 1.

INTERROGATORY NO. 2

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 2.

INTERROGATORY NO. 3

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 3.

INTERROGATORY NO. 4

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 4.

INTERROGATORY NO. 5

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 5.

INTERROGATORY NO. 6

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 6.

INTERROGATORY NO. 7

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 7.

INTERROGATORY NO. 8

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 8.

INTERROGATORY NO. 9

For the calendar year 1968, the arithmetic mean number of weeks of benefits received by all claimants filing valid new claims for unemployment insurance was 10.1 weeks, while the median number of weeks was 7.4 weeks.

INTERROGATORY NO. 10

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 10.

INTERROGATORY NO. 11

For the calendar year 1969, the arithmetic mean number of weeks of benefits received by all claimants filing valid new claims for unemployment insurance was 9.4 weeks, while the median number of weeks was estimated to be 7.0 weeks.

INTERROGATORY NO. 12

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 12.

INTERROGATORY NO. 13

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 13.

INTERROGATORY NO. 14

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 14.

INTERROGATORY NO. 15

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 15.

INTERROGATORY NO. 16

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 16.

INTERROGATORY NO. 17

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 17.

INTERROGATORY NO. 18

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 18.

INTERROGATORY NO. 19

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 19.

INTERROGATORY NO. 20

The department does not maintain statistics pertaining to the information asked for by Interrogatory No. 20.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 13, 1970

/s/ GEORGE ROCHE
George Roche, Chief
Research and Statistics
Section, Department of
Human Resources
Development

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In the United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA, et al.,
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Defendants.

STIPULATION

I. At least since 1948 (earlier records are in storage) the Department of Human Resources Development (formerly Department of Employment) has paid out unemployment compensation benefits to claimants immediately after such claimants have been determined eligible by a determinations interviewer. In the payment of unemployment compensation benefits, there is no delay attributable to the period in which a claimant's last employer may file an appeal. However, if an eligibility determination is appealed by an employer during the statutory 10-day period, the payment of benefits is stayed pursuant to Section 1335 of the Unemployment Insurance Code. In the usual case in-

volving an appeal by an employer, a claimant receives no more than two payments during this period. The claimant may receive additional payments in the event that an employer files a late appeal.

II. The sections of the local office manual submitted herewith are stipulated by the parties to be those sections which are relevant to these proceedings. Plaintiffs draw particular attention to Section 1400.1, 1400.2, 1400.25, 1400.3 (1-3), 1400.5 (1-3), 1404.2, 1404.4 (8-23), 1404.6 (1-4). In addition to the foregoing sections, defendants call attention to sections 1400.3 (4, 6), 1400.65, 1400.7, 1400.8, 1404.6 (10-11), 1472 (1-5, 13), 1474, 1507.6, 1509.1.

III. The contents of the April 7, 1970 memorandum of Thomas Griffin, attached to the claims forms submitted herewith, has been reviewed and agreed upon by the parties.

Dated: April 14, 1970.

CONTRA COSTA LEGAL SERVICES FOUNDATION

By: STEPHEN P. BERZON /s/
Stephen P. Berzon
Attorneys for Plaintiffs

Dated: April 14, 1970.

THOMAS C. LYNCH,
Attorney General
By: ASHER RUBIN /s/
Asher Rubin
Attorneys for Defendants

1400.1 PURPOSE OF DETERMINATION PROCESS

1. The determination is the point at which any issue affecting the clmnt's eligibility is decided and fulfills the Department's legal obligation to insure that:

a. Benefits are paid promptly if clmnt is eligible.

b. Benefits are denied promptly if clmnt is ineligible.

2. A secondary aspect of the determination process is to consider, when so requested by an Er, the circumstances surrounding a clmnt's separation from that Er and to rule whether or not the Er will be relieved of any charges to his account resulting from benefits drawn by that clmnt.

1400.2 WHEN DETERMINATION REQUIRED

1. A determination must be made promptly if there is any question of eligibility for weeks claimed or paid, except:

a. FS determination will be made only after the claimant is interviewed or admits wilful FS, except when:

(1) Employer demands immediate determination on FS issue, *or*

(2) The benefit year has ended, and (a) a desk cert is on file, or (b) the FS issue would affect benefits that have been paid.

b. No determination will be made until the claim is declared valid.

(1) When a 429 or 455 is sent to recompute an invalid claim, or a 4456 is sent for CO vertification, make a determination, if necessary, but do not tally it or release any written decisions unless the claim becomes valid.

(a) If claim is active, interview claimant and hold 2403 pending validity of claim.

(b) If claim is inactive, put 1173 in deck pending validity of claim.

2. When no benefits have been claimed since a potentially disqualifying act or situation and the claim is inactive, defer the determination until clmnt next reports — unless the Er specifically requests an immediate determination.

3. A determination on a separation issue can only be made in connection with a clmnt's last Er. A determination previously made on a separation from an incorrect last Er is null and void and may be corrected anytime within the BY.

1400.25 WHEN RULING REQUIRED

When an employer submits timely written information that a claimant was discharged from his employ or that a claimant quit, make a ruling promptly after making every attempt to contact claimant for his statement.

1400.3 THE DETERMINATION

1. You are responsible for making determinations which conform to the law, regulations, policy and precedent as officially released by the Department.

a. Use the BDG as a reference. If point of reference not contained there, refer to the Index Digest. In the event of conflict between references and written procedure, request clarification from Area Office.

b. Division Notices take precedence over existing procedure until such time as appropriate manuals are amended.

c. Use Fact-Finding Guide Sheets in BDG to facilitate the determination interview.

2. You have the authority and responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility.

a. If necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days from date of interview. If no reply is received, the determination must be made on the facts available and no later than the clmnt's next report day.

3. You are not required to sign 2403 for a determination you do not make; however, your supervisor has authority to require that your determination conforms to standards.

4. Notices of determination and/or ruling must be issued promptly.

a. Within one week of date of interview if all facts obtained by interview.

b. Within one week of suspense date if facts obtained by mail.

c. Any exception to this standard must be approved by supervisor.

• • • • • • • •

6. Advise disqualified clmnt of his reporting requirements and his rights to appeal so that he may protect his rights under the law.

1400.5 THE RULING-ONLY

1. Ruling decisions are based on facts obtained from Er and clmnt together with any other information obtained by the Department.

a. Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information.

2. Er and/or clmnt must be offered opportunity to confirm, contradict, refute or explain any evidence which is:

a. Inconsistent with information previously received from him, *or*

b. Adverse to his interests.

3. If Er protest and other available information does not clearly resolve issue, Er must be given an opportunity to provide additional information.

1400.65 FILING IN APPEAL

1. Interviewers may assist appellants to complete appeal forms only when it would be unduly difficult for appellant to complete them or have them completed.

2. Appeals on determinations or ruling-determinations must be transmitted to the referee office that serves the local office within one working day of their acceptance in the LO. Transmittal shall not be delayed for additional fact-finding or verification by the preappeal reviewer.

1400.7 PREPARING DETERMINATION, RULING, AND APPEAL FORMS

Interviewers will prepare notices of determinations, 1080 series; notice of rulings, 4454; appeal to referee, 1000 series; appeal to referee transmittal, 4868; appeal to Appeals Board, 1253; and requests for withdrawal of appeal, 1011; by hand if their handwriting is legible. If an interviewer is unable to improve his handwriting enough to be acceptably legible the manager may authorize typing of that interviewer's forms. Typing of notices of determinations, rulings, appeals to referee, appeals to referee transmittals, appeals to Appeals Board, or requests for withdrawal of appeal will not be established office policy.

1440.8 PULLING CORRESPONDENCE FOLDERS

1. Whenever determination, ruling, or appeal action is required, the appropriate fiscal year correspondence file is pulled.

2. Whenever any formal or informal evaluation of the determination or ruling process is made, the correspondence folder is pulled.

1404.2 PRELIMINARY REVIEW

1. Prior to calling clmnt, review available documents and substantiate need for determination.

a. Determination is needed if Er has protested clmnt's eligibility or if facts are present which indicate clmnt may be ineligible to receive benefits.

2. If appropriate correspondence folder not with claim jacket awaiting interview and 1101J (or 1101ED) noted that folder is used with another claim scheduled that day, locate folder on interviewer's desk, at refile, or in correspondence file.

a. If other interviewer has completed his actions, pull folder.

b. If other interviewer has not completed actions, pull correspondence from folder.

3. Plan line of questioning which will develop facts necessary to a proper decision.

4. Review reference material, if necessary.

1404.4 CONDUCTING INTERVIEW

• • • • • • • •

8. Explain need for interview and tell clmnt in a general way what information will be required from him. Explain

that the required information may concern matters which are of a very personal nature but which are essential to properly determine his eligibility for benefits.

9. Review CEP and complete items in accordance with instructions in Sec 1615.4.

10. Verify clmnt's most recent Er on all separation issues.

11. Complete identifying items at top of Record of Claim Status Interview, DE 2403.

12. Review 4935. If a separation issue is to be resolved and clmnt has not completed a 4935, have him complete it before continuing with the interview. If it is impossible for the clmnt to complete the form or have someone complete it for him, the interviewer shall complete it. A note should be made on the 4935 that the statements were recorded by the identified interviewer. Be sure it is dated and signed.

a. Clarify or verify any questionable statements.
   (1) Record information on 2403.
b. Check 4935 block on 2403.

NOTE: Under no circumstances make entries on 4935 after clmnt has signed it.

13. Permit clmnt to offer his own explanation of facts relative to the issues.

14. Review any notification of separation submitted by the clmnt or Er.

a. Record pertinent information on the 2403.
b. Return the notification to the clmnt or ER unless it is a copy in which case retain it as a part of the determination file.

15. Obtain additional information from clmnt by asking specific questions.

16. Record pertinent information obtained from clmnt under "Finding of Facts" on 2403.

a. Do not repeat information on the 2403 which already appears on 4935.

b. Staple 4935 and other pertinent documents to 2403.

17. Obtain necessary information from Er, union, or other sources as applicable.

a. List the name and position of person spoken to.

18. Record all pertinent facts.

a. Record background and general facts only as necessary to an understanding of conditions which are not documented.

19. Review Facts.

20. Question clmnt regarding any inconsistent or improbable facts. Verify, if necessary, by contacting logical sources of information.

a. Tell clmnt that verification of his representations will be made.

b. If possible, make telephone contact with other parties at time of determination interview. If the person is not available, contact him as soon as possible. Contact parties outside the immediate area by letter. Advise clmnt of reason for delay.

c. Record results of verification showing source and name of person.

(1) Show efforts to verify if verification unsuccessful.

21. Permit interested person(s) to confirm, contradict, refute, or explain any evidence which:

a. Is inconsistent with information previously received from that person.

b. Is adverse to his interests.

c. Raises a new issue.

22. Record results of rebuttal on 2403 showing:

a. Facts obtained.

b. Which assertion was determined to be correct and reasons for reaching this conclusion.

c. If interested party was given opportunity for rebuttal but was unable or unwilling to do so.

23. If additional facts, verification, clarification or rebuttal are needed from Er *and* contact cannot be made by telephone, prepare 4463. See 1428, DETERMINATION WHEN CLAIMANT NOT AVAILABLE FOR INTERVIEW.

1404.6 CONCLUDING INTERVIEW

1. Review facts with clmnt and ask him if he has anything further to add.

a. Record additional information (if pertinent) on 2403.

2. Decide clmnt's eligibility.

3. Tell clmnt in courteous, nontechnical language the reason for decision.

4. If decision is to be delayed, tell clmnt why.

a. If clmnt gives more pertinent information, record on 2403 and review decision in light of new information.

• • • • • • •

10. When 1080 is handwritten enter the final date an appeal can be filed.

a. Compute final date for filing appeal by excluding date of service to clmnt and including the 10th day unless it it a Saturday, Sunday, or holiday. In this event, extend time to next working day.

11. Advise clmnt of his appeal rights and appeal rights of Er.

1472 PROCESSING, REGISTERING APPEAL

Process appeals within one working day of receipt even though untimely or reconsideration pending. If later reconsideration reverses decision, appeal is withdrawn. (See 1490.2, SUPPLEMENT, in routing appeals to referee.)

1. Review appeal form for completeness, accuracy and signature.

2. Attempt to insure that grounds for appeal are stated —that appellant explains why he thinks the decision is not proper.

3. Complete items 8, 9 and 10 as appropriate and check the block for type of appeal. If appeal by letter, enter in item 3: "Refer to appellant's letter of (date)".

   a. If apparent that interpreter needed at hearing, enter under item 8: "NOTE: (language) speaking interpreter needed at hearing."

4. Print in red on 1101J and 1101R, if applicable, "Appeal (date)" using two spaces of LO Notes. If payment withheld, indicate ending date of disq or potential disq on 1101R. Post DC's to 1101R if applicable and PER schedule. If Er appeal, enter in first grid of 1101J: "Stop—appeal".

5. Complete DE 4868, Appeal to Referee Transmittal, by hand. List all items to be forwarded to referee and check for those to be duplicated and returned to LO.

   a. Forward original and two copies of DE 1000 and all related documents to referee.
   b. Do not send original 1101, 1190 or 2451. If needed, send copy.
   c. If appeal from DE 4614, Notice of Denial or Cancellation of Ruling or Determination, send all documents relating to merits of original ruling.
   d. If timeliness of Er protest verified by 733 from CO Acctg Sec, send it to referee.

e. If appeal from clmnt FS disq, send all basic documents relating to FS to referee including 1426, 4935, 4581, 2402. If FS on 1101, 1190 or 2451, make copy.

f. Send 1426 in all separation cases and where items listed on 1426 relate to issue under appeal.

g. Ask for duplicate copies of documents LO will need for presentation of case at hearing, reconsideration of AA issue prior to hearing, and those necessary to evaluate pre-appeal review and referee's decision.

h. If more than one copy of document is needed, the request is submitted to Duplicating Unit by the use of DE 1862, Photocopy Work Order. Copies are not ordered for clmnts, Ers or their agents. Such requests should be referred to the referee.

i. Order copy of 2403 in all cases except TD.

• • • • • • • •

13. If Er appeals decision holding clmnt eligible, send clmnt copy of decision with DE 4944.

1474 PROCEDURE DURING PERIOD OF APPEAL

Special rules apply to claims actions during the appeals period which begins when the determination under appeal is effective and continues until the referee or Board decision is recieved or any potential disq is served or purged.

1. When clmnt contacts LO regarding an appeal on eligibility filed by Er explain that benefits cannot be paid for weeks involved in appeal.

a. Tell clmnt to certify for each week for which he desires to claim benefits.

(1) Explain that benefits may be paid if decision in his favor.

b. Explain requirements for purging or lifting potential disq.

2. Accept certifications for weeks of unemployment but do not process an AC during the effective period of potential disq by the referee.

3. Consider and resolve:

a. Any new issue which arises while clmnt certifying during period of appeal.

1507.6 OP RESULTING FROM APPEAL DECISION

1. Do not contact clmnt when OP results from Appeal Decision.

a. Issue 1444, but no 1080 OP. Clmnt has received decision.

b. Convert any desk certs representing withheld benefits pending appeal decision to 826F offsets if clmnt otherwise eligible. See Sec 1504.3, COLLECTION BY OFFSET.

c. If OP balance remains after any desk certs representing withheld benefits are converted to offsets, consider waiver of balance. See Sec 1509 WAIVERS.
   (1) Do not waive if Referee or Board finds clmnt liable for OP.

d. If appeal from OP results in decision increasing the amount of OP, see Sec 1510.3, PROCESSING APPEAL DECISIONS.

2. Do not establish OP if Board disqs clmnt after both LO and Referee have held clmnt eligible. This is a double affirmation, and therefore no benefits were erronerously paid.

1509.1 WAIVER STANDARDS

Determine whether to recoup or waive an OP pursuant to the following standards. Do not allow considerations of

sympathy or clmnt's financial status to influence the determination.

1. Clmnt *is liable* and recoupment is required if:

a. Clmnt made FS or withheld material facts in order to draw benefits.

b. There is some fault on the part of the clmnt in the payment of benefits. For example:

(1) Clmnt did not report refusal of work or referral and 1173 was not filed with the claim prior to payment.

(2) Clmnt accepted payment after he had received written or verbal notice of disq, and it is reasonable that he knew payment was in error.

c. In all of the following without regard to question of fault:

(1) Duplicate benefits for a single week.

(2) Back pay award for wages that would have been paid if clmnt had worked. See Sec 1508.2, BACK PAY AWARD.

(3) FEPC award in lieu of wages. See Sec 1508.3, FAIR EMPLOYMENT PRACTICES COMMISSION (FEPC) WAGE AWARD.

(4) Temporary Total Disability Indemnity under Workmen's Compensation for same period benefits paid. See Sec 1508.1, WORKMEN'S COMPENSATION.

(5) Referee or Board finds clmnt liable for OP.

2. Clmnt is *not liable* and waiver is proper because there is no fault on part of clmnt when OP is result of:

a. Redetermination made to correct previous determination where both determinations are based on *same* facts.

b. Reversal by Referee or Appeals Board of determination allowing WP or benefits when decision is based on *same* facts.

c. Modification of LO determination by Referee or Appeals Board which increases disq and creates or increases OP if decision is based on *same* facts.

d. LO determined claim to be valid under Sec 1277 when processing 4456 but later found that 4456 was in error and claim invalid although wage information supplied by clmnt was correct.

3. To determine whether to waive or recoup in other than the specific situations outlined above, following standards should be applied:

a. Waiver is proper if clmnt is entirely without fault and benefits were paid in error.

b. Recoupment is required if benefits were received due to error but the clmnt knew the error was being made and did not say anything about the error (the clmnt is at fault).

4. Do not waive OP on claim which is going to be established by another state. See Sec 1508.4, INTERSTATE OP. Waiver decisions on these cases will be made by Chief of Benefits.

Memorandum Prepared by California Department of Human Resources Development

PROCEDURAL STEPS IN FILING AND PROCESSING A CLAIM FOR UNEMPLOYMENT INSURANCE BENEFITS

I. The claimant files a new claim for unemployment insurance benefits.

A. The claimant *submits* the following documents:
   1. A form DE 1101 (New Claim), a four-part form (Exhibit 1).
      a. The original copy is forwarded to the headquarters office of the department for a computation of the claimant's weekly and maximum benefit amounts.
      b. The second and third copies, joined together, are mailed to the claimant's last employer as indicated by the claimant on the date that the claim is filed.
         (1) The second copy is for the employer's files.
         (2) The employer is required to return the third copy to the local office within 10 days with information relating to the claimant's eligibility for benefits.
      c. The fourth copy is retained by the local office in which the claim is filed.
   2. A form DE 1426 (Initial Claim Statement, Exhibit 2). This document is reviewed for completion at the time the DE 1101 is filed and is retained by the local office for a later, more detailed, review at the eligibility Benefit Rights Interview (See 2, below).

B. The claimant *is given* the following documents:
   1. A form DE 1275A (Unemployment Insurance Handbook for Claimants, Exhibit 3), with at least page 16 completed.
   2. A form DE 4681A, DE 4681B, or DE 4681C (Seek Work Plan, Exhibit 4A-C), whichever is applicable to the claimant.

3. A form DE 3893 (Claimant Profile, Exhibit 5). The claimant is instructed to complete the document and return it to the department at the time of the Eligibility Benefits Rights Interview.
4. If either the answer to question No. 8 on the DE 1101 (see step 1.A.1, above) or the answer to question No. 12 on the DE 1426 (see step 1.A.2, above) indicate a potential issue of eligibility because of the circumstances surrounding the claimant's leaving of his last employment, he is given a copy of the form DE 4935 (Claimant's Separation Statement, Exhibit 6) with the instructions to complete the document and return it to the department at the time of the Eligibility Benefit Rights Interview (See 2, below).
5. Two copies of form DE 4581 (Continued Claim Statement, Exhibit 7). The dates of the Saturday of the first and second weeks following the effective date of the claim, respectively are stamped on the cards. The claimant is instructed to return the completed cards at his Eligibility Benefit Rights Interview so as to certify to his eligibility for benefits for each week.

C. The department completes the heading on the following document:
   1. A form DE 1101J (Exhibit 8), an envelope into which is placed the office copy of the DE 1101 (see item 1.A.1., above) and the DE 1426 (see item 1.A.2., above).

D. The claimant is scheduled to return to the office in the third week following the effective date

of his claim for the purpose of receiving an Eligibility Benefit Rights Interview and for the purpose of certifying for and receiving benefits for the second week following the effective date of his claim.

II. The Eligibility Benefit Rights Interview.

When the claimant returns to the local office for his Eligibility Benefit Rights Interview, the interviewer reviews with the claimant his answers on the DE 1101 (New Claim), the DE 1426 (Initial Claim Statement), the DE 3893 (Claimant Profile), the DE 4935 (Claimant's Separation Statement) if any, and any employer response on the second copy of the DE 1101.

A. If no issue arises from the circumstances surrounding the claimant's leaving of work, the claimant is advised as to methods of seeking work which are likely to be productive for him.

B. If an issue arises as to the claimant's eligibility, either from his answers on one of the documents or because of information submitted by the last employer, a formal determination is made as to the claimant's eligibility. Information received from any source is summarized by the interviewer on a form DE 2403 (Record of Claim Status Interview, Exhibit 9).

(1) If the claimant is disqualified from or held ineligible for benefits, he is served personally or mailed a copy of the form DE 1080 (Notice of Determination, Exhibit 10).

(2) If the claimant is held eligible for benefits, he is given credit for a waiting period of one week following the effective

date of his claim and is paid for the first compensable week of unemployment which is the second calendar week following the effective date of his claim. If the eligibility issue arose because of information submitted by the claimant's last employer, that employer is mailed a form DE 1080E (Notice of Determination, Exhibit 11). If the claimant continues to draw benefits, he is given a form DE 2402 (Periodic Questionnaire, Exhibit 12), approximately every 5 weeks in lieu of the form DE 4581 (Continued Claim Statement) for that particular week.

III. The Appeal.

A. If the claimant is disqualified from or held ineligible for benefits, he may file his appeal with the local office or a referee office on a form DE 1000 (Appeal To A Referee, Exhibit 13). This form is suggested and preferred but appeals filed by way of a letter or another form are processed as valid appeals.

B. If the claimant is held eligible for benefits, the employer may appeal using the same form DE 1000 (Appeal To A Referee) although, again, the use of this form is not mandatory. In the event of an employer appeal, a copy of the DE 1080E which was previously sent to the employer, is now mailed to the claimant with a cover letter form DE 4944 (Transmittal Of Amended Determination, Exhibit 14).

In The United States District Court For The Northern District Of California

CASE NO. C-69 350 ACW

Filed May 14, 1970

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development; Esther Perry, as Manager the Pittsburg, California branch of the California Department of Human Resources Development; Ramon L. Jimenez as Manager of the Richmond, California branch of the California Department of Human Resources Development,

Defendants.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

BEFORE: JERTBERG, U. S. Circuit Judge; and ZIRPOLI and WOLLENBERG, District Judges.

This is a challenge, on both statutory and constitutional grounds, to certain aspects of the California unemployment compensation program. This program, certified by the Secretary of Labor under the provisions of the Social Security Act (42 U.S.C. § 503), provides for the payment of

insurance benefits, over an extended period of time, to persons who find themselves unemployed "through no fault of their own". Calif. Unempl. Ins. Cde. § 100. These payments begin after an initial determination of eligibility by an eligibility interviewer who is directed to consider all information submitted by the claimant, his former employer, and others. Calif. Unempl. Ins. Cde. §§ 1326 et seq. If this initial determination is favorable to the claimant, payments begin immediately. The employer, however, is then given ten days in which to appeal; if an appeal is filed, benefits are stopped pending decision on the appeal without any provision for a pre-termination hearing. Calif. Unempl. Ins. Cde. § 1335. It is this statutorily directed stoppage of benefits without prior notice and hearing which is under challenge by plaintiffs.

Plaintiffs' argument is three-fold. First, it is said that since the median delay in resuming payments after an employer has invoked § 1335 is about seven weeks, the California program conflicts with certain clearly defined national and state goals. The California scheme is intended to stave off extreme personal hardship as well as society-wide depression in times of increasing unemployment. See Calif. Unempl. Ins. Cde. §§ 100-101. This end is clearly thwarted when a claimant must wait some fifty days for payments to resume. Second, the California statute is said to violate the federal law which directs that state unemployment compensation programs must be "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). Third, it is argued that the denial of benefits, without a prior hearing, to persons who have already been found initially eligible for such benefits violates plaintiffs' rights to due process of law under the federal constitution. Most relevant to this is the Supreme

Court's recent decision in *Goldberg v. Kelly,* ..... U. S. .....(1970).

The constitutional aspects to this challenge to § 1335 warranted the appointment of a three-judge court. 28 U.S.C. § 2284.

Plaintiffs' three arguments are, in fact, nearly co-extensive. The "payment when due" directive of the Social Security Act is indicative of a congressional desire to help the jobless when they need it most. It can also be read as a reiteration of the classic due process standard, i.e. when a person has been found entitled to a government benefit, this benefit in most cases cannot be taken away without certain pre-termination procedures being followed.[1] It seems best, therefore, to analyze the operation of the California system in order to determine when an individual claimant is "entitled" to unemployment compensation. If payments are "due", deprivation of those payments without a prior hearing would raise questions under both the federal statute and the Constiution. Most simply, when is "when due"?

The parties herein have entered into a stipulation which does much to clarify the actual practices of the State Department of Human Resources Development. A claimant for unemployment insurance benefits must initially file Forms DE 1101, 1426 and 3893. These forms, taken together, apprise the eligibility interviewer of the basis of the claim, the name of the claimant's previous employer, the reason for his no longer working, his work experience, and so on.

---

1. An entitlement to unemployment insurance benefits or welfare payments is no different from the due process standpoint than an entitlement to a pension, or a farm subsidy, or a professional license to practice. Once a person's qualification for the benefit is shown, it cannot be arbitrarily denied, or withdrawn, without due process standards being fulfilled. See *Goldberg v. Kelly, cit. supra,* note 8; and Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L.R. 1439 (1968).

The question most frequently basic to disputed cases, i.e. the claimant's reasons for no longer working, is answered on DE 1101 and copies of this form are immediately sent to the previous employer for verification. The employer is then bound to submit, within ten days, "any facts then known which may affect the claimant's eligibility for benefits". Calif. Unempl. Ins. Cde. § 1327. If the employer raises an issue as to eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job.

All of this tends to show that the eligibility interviewer has at his disposal information from both employer and claimant prior to the "Eligibility Benefit Rights Interview", at which he speaks personally with the claimant. The interviewer has, according to the Local Office Manual used in California, the duty "to seek from any source the facts required to make a prompt and proper determination of eligibility". The actual decision may be suspended an additional ten days to get further information. If employer statements leave certain questions unresolved, the employer "must be given an opportunity to provide additional information". L.O.M. §§ 1400.3; 1400.5. At the interview itself, the interviewer is told to make "telephone contact with other parties . . . ." if at all possible. L. O. M. 1404.4. Interested persons must be allowed to "confirm, contradict, refute, or explain any evidence [which is relevant]". L.O.M. § 1404.4.

The eligibility interviewer must, then, consider the evidence presented by all sides and make a "determination" on "determination ruling" as to eligibility. There seems little question that this is the critical point in the California procedure. The Department itself proclaims that "[t]he determination is the point at which any issue affecting the

claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible". L.O.M. § 1400.1. Payments begin upon this decision, and for 95% of claimants, no further problem arises as to initial eligibility.

Defendants, however, argue that payments are not in fact "due" until another ten days passes without the employer appealing. This flies in the face of actual Department practice, which is to begin payments immediately upon the initial determination of eligibility and to stop them later upon an employer appeal.[2] The appeal Form DE 1000, upon being filed, halts payments. No hearing is held; no chance is given the claimant to rebut, even in writing, new information offered by the appellant. It is clear that in California payments become "due", and are paid, upon the favorable decision of the eligibility interviewer. It is only subsequently, generally after two payments have been made, that an employer appeal will result in automatic stoppage.

"When due" is, then, upon the initial determination of eligibility. At that point, all parties have been heard, evidence has been collected, and an adjudication made. This being the case, California's provision allowing benefits to be stopped without any pre-termination procedures raises serious due process questions. And the continued arrest of payments for a median period of seven weeks similarly causes doubt as to whether California's program is "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1).

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2. "At least since 1948 . . . the Department of Human Resources Development . . . has paid out unemployment compensation benefits to claimants immediately after such claimants have been determined eligible by a determinations interviewer". Parties' Stipulation, filed April 14, 1970.

This Court finds the present case indistinguishable from *Goldberg v. Kelly cit. supra.* See also *Wheeler v. Montgomery,* ..... U.S. ..... (1970). *Goldberg* challenged the right of a State to terminate welfare benefits without a prior evidentiary hearing at which the recipient is given the chance to confront adverse witnesses and present his own evidence, verbal or written. As here, the defendants in *Goldberg* argued the State's interest in protecting public funds. The Supreme Court, balancing this interest against the interest of the welfare recipient in having the necessities of life while the bureaucracy mulls over his continued eligibility, found the fiscal argument somewhat weak, and rejected it. Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in *Kelly v. Wyman,* 294 F. Supp. 893 (1968), and the garnishee in *Snaidach v. Family Finance Corp. of Bay View, et al.,* 395 U.S. 337 (1969).

Further, the defendants' efforts to distinguish this case from the constitutional reasoning of *Kelly* and *Snaidach* only serve to point up the validity of the statutory grounds argued by plaintiffs. The most fundamental purpose of both the federal and the state unemployment compensation laws is "to *prevent* the burden of injured employees becoming charges upon society". *Abelleira, et al. v. The District Court of Appeal, etc.,* 17 C.2d 280, 300 (1941); Calif.

Unempl. Ins. Cde. §§ 100-01.[3] Defendants urge that public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. This was certainly the primary reason for 42 U.S.C. § 503(a)(1) and the requirement that State programs assure full payment of benefits "when due". Yet some five thousand *eligible* recipients each year in California find their payments halted for a median period of seven weeks. Since the average period of unemployment in California is, according to uncontested argument before this Court, some nine weeks, it is clear that as to these people, payments are not made "when due", and the fundamental intent and policy of the Social Security Act are thwarted.

Accordingly, this Court finds Calif. Unempl. Ins. Cde. § 1335 defective on both constitutional and statutory grounds. By not providing for a pre-termination hearing, it runs counter to the principles enunciated in *Goldberg v. Kelly, cit. supra.* And by being applied so as to result in a median seven week delay in payments to claimants who have been found eligible for such payments, the California statute violates the directive of 42 U.S.C. 503(a)(1).

Therefore, IT IS HEREBY ORDERED that defendants, their successors in office, agents, and employees, be, and are, enjoined, during the pendency of this action, from

---

3. The total inadequacy of locally administered charity in times of nation-wide cyclical unemployment led sponsors of unemployment insurance legislation to urge upon Congress a purely federal scheme. Political and legal considerations resulted, however, in the present federal-state setup, with the federal government imposing many standards to be followed by the States. Among these standards was the requirement of payment of claims "when due". On the legislative history, see generally Witte, *Development of Unemployment Compensation,* 55 Yale L.J. 21 (1945). See also Note, *Charity vs. Social Insurance in Unemployment Compensation Laws,* 73 Yale L.J. 334 (1963); *Rivard v. Bijou Furniture Co.,* 27 A 2d 853 (1942); *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87 (1937).

enforcing that part of Calif. Unempl. Ins. Cde. § 1335 which provides that "[i]f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision". Defendants, their successors in office, agents, and employees, shall not suspend unemployment benefits due plaintiffs and members of their class on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly, cit. supra.*

Execution of this Order will be stayed ten (10) days from the date of its filing. Any further stay will be granted only upon a proper motion and showing by defendants.

Dated: April 11, 1970

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

/s/ ALBERT WOLLENBERG
United States District Judge

Supreme Court of the United States

No. 507 ----- , *October Term, 19* 70

California Department of Human Resources Development, et al.,

Appellants,

v.

Judith Java, et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 26, 1970

FILE COPY

Supreme Court, U.S.
FILED
AUG 7 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1970

No. 507

JUDITH JAVA, et al.,
Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants.

On Appeal From the United States District Court
For the Northern District of California

Jurisdictional Statement

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In the Supreme Court of the United States

OCTOBER TERM 1970

No. .....

JUDITH JAVA, et al.,

Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,

Appellants.

On Appeal From the United States District Court
For the Northern District of California

Jurisdictional Statement

Appellants appeal from the interlocutory judgment of the United States District Court for the Northern District of California entered on May 14, 1970, preliminarily enjoining appellants from enforcing a section of the California Unemployment Insurance Code, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial constitutional questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of California is not reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought on behalf of appellees and all others similarly situated for injunctive and declaratory relief under the authority of Title 42, U.S.C., section 1983, and Title 28, U.S.C., sections 1343(3) and 1343(4), and sections 2281 and 2284. Jurisdiction was further invoked under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C., section 501 et seq. The judgment of the specially constituted District Court was entered on May 14, 1970, and notice of appeal was filed in that court on June 12, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C. sections 1253 and 2101(b). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime & Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1960).

STATUTES INVOLVED

Two statutes are involved: section 1335 of the California Unemployment Insurance Code and section 503(a)(1) of Title 42 of the United States Code. Section 1335 of the California Unemployment Insurance Code provides as follows:

> "1335. If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:
>
> "(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal,

such benefits shall be promptly paid regardless of such appeal, or

"(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

The text of 42 U.S.C. § 503 is attached as Appendix B.

QUESTIONS PRESENTED

1. When a claimant for unemployment insurance has been ruled eligible in an initial interview but her last employer appeals that determination, does a procedure which stays payment of benefits until the employer's appeal is decided deprive the claimant of due process?

2. When a claimant for unemployment insurance has been ruled eligible in an initial interview but her last employer appeals that determination, is the requirement of 42 U.S.C. section 503(a)(1) that the state's procedure must be "reasonably calculated to insure full payment . . . when due" satisfied by a procedure which permits payments to be made only after a referee decides the employer's appeal?

3. A subsidiary question is presented because of the district court's ruling that California Unemployment Insurance Code section 1335 is totally invalid: Where a set of facts may reasonably be conceived to save the constitutionality of a state statute, should a federal court nevertheless rule that the statute is unconstitutional in its entirety?

STATEMENT OF THE CASE

Appellees Judith Java and Carroll Hudson and the class they represent are California citizens who (1) have claimed or will claim unemployment insurance benefits, (2) have been initially determined eligible for benefits, and (3) have not received benefits pending an appeal by their last employer.

In late summer 1969, appellees Java and Hudson applied for unemployment insurance benefits. Pursuant to California procedure, they filled out the necessary forms. Each claimant's last employer contended that benefits should be denied because the claimant was discharged for misconduct or voluntarily quit without good cause. Each claimant was thereafter granted an interview for an initial determination as to eligibility. As a result of these interviews both claimants were ruled eligible for benefits. California procedure further provides that such a determination may be appealed by the last employer within ten days. During this ten-day period a claimant may receive one or two payments but once the employer's appeal is filed, no further payments are made until the appeal is decided. Both claimants here received one or two payments until their last employers filed appeals, at which time further payments were withheld. At the subsequent hearings before a referee plaintiff Hudson's eligibility was affirmed, but in the case of Judith Java the referee reversed the initial determination and ruled she had never been entitled to benefits.

Prior to the hearings before the referee appellees brought this class action for declaratory relief and to enjoin enforcement of section 1335 of the California Unemployment Insurance Code, alleging that they and members of their class should be paid benefits during the time an employer's appeal was pending. Defendants filed a motion to dismiss. The relief prayed for by plaintiffs was granted, the court

ruling that the instant case was indistinguishable from *Goldberg v. Kelly*, 397 U.S. 254 (1970). It further ruled that the California statute does not provide a procedure which is reasonably calculated to insure full payment "when due" and the statute is, therefore, inconsistent with section 503(a)(1) of Title 42, U.S.C., the Social Security Act of 1935, as amended.

THE QUESTIONS ARE SUBSTANTIAL

I. The California Procedures Are Not Inconsistent With the Social Security Act.

The Social Security Act, 42 U.S.C. section 503(a)(1), provides that for the Secretary of Labor to find the state law consistent with federal standards, the state statute must be "reasonably calculated to insure full payment . . . when due." Unfortunately, there is scant legislative history concerning what Congress meant when it used the words "when due". Nevertheless, from the material available it appears that the California statute here involved, California Unemployment Insurance Code section 1335, is in harmony with the federal requirement that payments be made "when due". The California law is based on a recommendation made by federal authorities in 1935. Because the concept and mechanics of unemployment insurance were so complex the task of drafting a proposed federal law was entrusted to a Presidential Committee on Economic Security. While the Social Security Act was under consideration by Congress in 1935, this Committee presented to Congress and circulated to the states two alternative statutes which would serve as models for state laws. Both model statutes provided for procedures indentical to California Unemployment Insurance Code section 1335. See Hearings on S. 1130 Before the Senate Committee on Fi-

nance, 74th Cong., 1st. Sess. at 602, 623 (1935). It is therefore apparent that the state procedures under examination here were before the Congress and considered by it and by the President's committee. It is ludicrous to believe Congress would acquiesce to the circulation of a model bill if it contained provisions inconsistent with a law (the Social Security Act) which Congress itself was considering at the same time.

Section 1335 is supported not only by the history recited above, but also by common sense and by the commonly accepted meaning of the words "when due". Payments are "due" when they may properly be said to be "owing", *People v. Buckles,* 57 Cal.App.2d 76, 79 (1943), or, in other words, when the obligation has matured or become fixed.[1] *Feeser v. Feeser,* 93 Md. 716, 50 A. 406 (1901); *Cf. Joyce v. Scott,* 265 F.2d 369, 371-372 (1959); See also *In re Ingersoll Co.,* 148 F.2d 282, 284 (1945). While no universal rule may be formulated as to when an obligation is fixed appellants submit that in the context of unemployment insurance the Legislature has spoken, declaring that this point is reached only after an employer's appeal has been heard and resolved. This legislative judgment makes good sense. When an employer appeals, there is a sufficient cloud on the initial

1. In California, following an initial determination favorable to a claimant, the State does commence payment immediately. However, if the employer appeals within the allowable ten day period, such payments are halted; in most cases the claimant has received one or two payments. The fact that the State has commenced payment following the initial determination should not be misconstrued. It is by no means a judgment by the State that the money is "owing" at that point or is legally due. It simply represents a recognition by the State that the employer probably will not appeal and there is little risk in proceeding to pay the claimant immediately. The soundness of this judgment is borne out by the fact that in 1968, for example, employers filed appeals in only two per cent (2%) of those cases where an initial determination was made favorable to the applicant.

determination as to warrant withholding benefits until the appeal is decided.[2] By contrast, at a later point in the proceedings, if the referee affirms the initial determination, the claimant's ultimate success is deemed sufficiently probable as to justify commencement and continuation of payments irrespective of further appeals. Cal. Unemp. Ins. Code § 1335(b).[3]

Obviously, claimants would prefer the extreme sought by the plaintiffs here, i.e., that benefits be due and payable immediately. On the other hand, employers would prefer that benefits be withheld so long as the decision to pay is under appeal at any level, including the appeals through the courts. In balancing these conflicting demands, the Legislature has struck a compromise in suspending benefits following an eligibility determination only through one level of review or until the first appellate level decides in the claimant's favor. See *Abelleira v. District Court of Appeal*, 17 C.2d 280, 298 (1941).

In light of the fact that section 1335 is, in effect, a legislative pronouncement as to when payments are due and because that pronouncement has a sound basis, it is unreasonable to contend that the obligation is "fixed" after the initial determination by a claims interviewer.

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2. California statistics indicate that employers generally do not file frivolous appeals; in 1968, for example, they prevailed in forty-seven percent of cases decided by referees on appeals filed by employers.

3. It is not by any means certain that the Constitution compels payments to be made even at this point. *Cf. Pennsylvania Chamber of Commerce v. Torquato*, 386 Pa. 306, 125 A.2d 755, 767 (1956); *cert. denied*, 352 U.S. 1024; *Chrysler Corp. v. Appeals Board of Michigan Unemployment Comp. Commission*, 301 Mich. 351, 3 N.W.2d 302 (1942); *State ex rel. Campbell v. State*, 223 Ind. 59, 57 N.E.2d 433 (1944); *Dallas Fuel Co. v. Horne*, 230 Iowa 1148, 300 N.W. 303 (1941).

Moreover, this conclusion is buttressed by due process considerations. A sensible interpretation of the subject term is that payments are legally "due" in contested cases only after both sides have had an effective opportunity to be heard. The California statute reflects this principle. At the initial interview generally only the claimant is present; he presents his version of the facts and may bring witnesses and documents to support his claim. The employer, who is preoccupied with business and has had no prior notice of the interview, does not appear. He is contacted by telephone and informally asked for his account of the facts. Following the determination, the employer is informed of the decision and may then appeal. Until this point only the claimant has had a full opportunity to present his case; *as a practical matter,* the employer has not had an effective opportunity to be heard. Until this opportunity is available, it is grossly unfair to rule that payments are due. To compel payments during the pendency of the employer's appeal would be to substantially dilute the employer's right to be heard. *Cf. Babb v. Bullitt,* 310 Ky. 211, 220 S.W.2d 394 (1949). Such payments are unrecoverable[4]

4. While there are statutory recoupment procedures available, Cal. Unemp. Ins. Code § 1379, these may be used only when the claimant has committed some fraud or misrepresentation or when it would not be against equity and good conscience to seek recoupment. Cal. Unemp. Ins. Code § 1375. See also § 1380. Moreover, even if it is not against equity and good conscience to request repayment, some claimants are simply insolvent and unable to repay. In any event, should plaintiffs prevail here, the state may be compelled to abandon the lenient policy exemplified by section 1375. *Cf.* Graham, *Public Assistance: The Right to Receive; The Obligation to Repay,* 43 N.Y.U. L.Rev. 451, 487 (1968).

The unrecoverable money which would be paid out during the pendency of appeals would have a cumulative, measurable effect on the reserve fund and would, after a period of time, cause employers to be charged a higher rate. See Cal. Unemp. Ins. Code §§ 930, 976.5, 977 and 978.

and, in effect, amount to an adjudication, before the employer has had a meaningful chance to contest it, that he is liable for benefits on behalf of the claimant.

It may be asked why employers have not complained about this seeming lack of due process. The answer is that the claims determination procedure is geared primarily to handle thousands of claims expeditiously. In the overwhelming percentage of cases attendance by an employer at a determinations interview would inconvenience the employer for no valid reason—he is not likely to contest the determination anyway. As a matter of fact, it he does wish to appear, he may do so but this happens only infrequently since, generally, the employer first learns of the interview when the claims interviewer calls him while the claimant is in the process of being interviewed at the Department's office. Thus, practical considerations dictate that the employer forego his technical right to appear at the initial interview. And 98% of the time the employer is not prejudiced. In those few cases where the employer sees fit to appeal, he should have a real opportunity to be heard before a ruling adverse to him is given effect.

The Legislature has decreed that payments are due not after the initial determination of eligibility, but only after the employer has had an opportunity to have his appeal heard. This procedure is both practical and fair, a conclusion partially confirmed by the fact that the Secretary of Labor has certified the California procedure (and similar statutes throughout the nation), thus indicating his satisfaction that there is no inconsistency between section 1335 of the California Unemployment Insurance Code and section 503(a)(1) of the Social Security Act. The opinion of the Secretary in this regard is entitled to great weight. *Cf. Rosado v. Wyman,* 397 U.S. 397, 406-407, 415 (1970).

Parenthetically, we would note that the district court's decision could have ironic and unfortunate consequences: (1) By stressing that the state has commenced payment and that the initial determination is critical, the court is inviting a change in the law which would be designed partially to compensate for the expense occasioned by the *Java* decision. Such a change would be disastrous for the overwhelming majority of claimants. It would prohibit payment altogether until the appeal period has run or the referee has made a decision. (2) A hearing at the initial stage would itself consume a considerable period of time. Whereas now 98% of all claimants receive payments almost immediately, a large percentage of them would be delayed by the requirement of a hearing, thus frustrating the intent of the unemployment insurance program on a scale of unprecedented magnitude.

II. The Principles of Goldberg v. Kelly, 397 U.S. 254 (1970), Apply to Welfare Cases But Not to Unemployment Insurance.

A. THE FACTS OF GOLDBERG ARE DISTINGUISHABLE FROM THOSE INVOLVED HERE.

In the *Goldberg* case, a welfare claimant sought redress against action by the state in terminating welfare benefits which were paid out of general tax revenues. Unemployment insurance programs, however, operate differently from welfare programs. First, an application for unemployment insurance benefits involves not only the claimant and the state but the private employers who fund the program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) which is required to make contributions into a reserve fund to pay benefits. Because of this method of funding the program, the state does not have the same direct interest it has in the welfare situation where

every dollar the state saves may be available for other programs which compete for state funds. In the unemployment insurance area the state is basically neutral since it cannot use the unemployment insurance fund for other state purposes but must simply insure that sufficient money is available in the fund to pay eligible claimants. The state, then, may be looked upon as a fiduciary in administering the unemployment insurance fund. The real parties in interest are the employers who will be required to pay more into the fund if plaintiff's position here is adopted. The injection of this private interest introduces an element in this case which was not present in *Goldberg*. The importance of this element is that here we are concerned with due process for two parties—claimants and employers—whereas in the welfare situation the concern was solely that the claimant would receive due process.[5]

Second, the posture of the welfare claimant in *Goldberg* is different from the instant unemployment insurance claimant. In *Goldberg* the welfare claimant was initially found eligible for benefits and was paid on a continuing basis. Following a caseworker's recommendation the claimant was notified that the department proposed to terminate benefits and the claimant was given an opportunity to submit in writing his reasons why such termination should not take effect. The U. S. Supreme Court ruled that this decision to terminate could not constitutionally be made without a prior hearing. The case here is quite different. Here no decision

5. The first sentence of the majority opinion in *Goldberg* demonstrates this concern:

> "The question for decision is whether a State which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination *denies the recipient procedural due process* in violation of the Due Process Clause of the Fourteenth Amendment." 397 U.S. 255. (Emphasis added.)

to terminate is imminent. Payments are not being terminated but merely held up prior to a final trial-type adjudication on the initial question of eligibility.

B. THE PROCEDURES UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE AFFORD PROTECTION THAT WAS UNAVAILABLE IN GOLDBERG.

Due process is not a brittle concept incapable of bending to accommodate differing factual circumstances. What due process requires in one case may be wholly unsuitable to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed content unrelated to time, place and circumstances. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

Due process is a rule which seeks to achieve a balance between legitimate state interests[6] and rights of individual citizens. In the *Goldberg* case the court found that the state interest did not justify the procedures employed or, in other words, that the balance was lopsided in favor of the state welfare department. Prior to being terminated, the claimant in *Goldberg* had no opportunity for a personal appearance, oral presentation or confrontation and cross-examination of adverse witnesses. 397 U.S. at 259.

Unlike *Goldberg*, here there is no semi-unilateral administrative reversal of an eligibility determination which may be followed by a post-termination hearing. In *Goldberg* the state sought to take quasi-judicial action adverse to the claimant without affording him a hearing. Here the claimant has had a hearing and has been determined eligible but the employer has not had his hearing and it is to give the employer *his* chance to be heard that a temporary stay

6. "State interest" may be a misnomer in this case. While the state does have an interest in the sense that this program is socially desirable, the critical financial interest is that of private employers.

of benefits is imposed. Until that opportunity has been afforded, the question of eligibility is still unresolved.

Indeed if there is any imbalance in the procedures involved in this case it is in favor of the claimant who, when he makes his initial application and has an interview, is permitted to submit both written and oral evidence, to present witnesses, and to dispute on the spot any information supplied by an employer who communicates generally only by telephone or in writing.

In part to redress this imbalance, the employer is given an opportunity to appeal the initial determination and have a hearing. As pointed out earlier, for all practical purposes this is his first opportunity to present his case effectively. He may arm himself at this time with the books of the company, with witnesses and with the persuasive weight of his own testimony. In any event he should not be penalized by his insistence on an opportunity fully to present his case. Commencing payments until a referee has rendered a decision would amount to such a penalty and would vitiate the effect of giving the employer the right to be heard.

C. NEED IS THE PIVOTAL CONSIDERATION FOR WELFARE ELIGIBILITY BUT NOT FOR UNEMPLOYMENT INSURANCE.

Critical to an understanding of the *Goldberg* decision is the recognition that the extent of a claimant's need was determinative on the question of whether that claimant was being afforded procedural due process. This is set out in the opinion in unequivocal terms, "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . ." 397 U.S. at 263. The claimant's "brutal need", noted by the lower court, was the fulcrum on which the Supreme Court based its holding.

But need is not relevant to a determination of eligibility for unemployment insurance benefits.[7] Indeed the irony is that the greater an employee's need the less unemployment insurance he is likely to receive. The amount of weekly benefits a worker receives varies proportionately with his wages in a four-quarter period and the quarter in which he receives his highest wages. Cal. Unemp. Ins. Code §§ 1275, 1280 and 1281. The higher his wages the higher the weekly benefit and the total maximum benefits he receives. Thus those who have more need receive lower, not higher benefits. Moreover, a worker who has earned less than $720 in the four quarters of his base period is not entitled to any benefits whatsoever. Cal. Unemp. Ins. Code §§ 1275 and 1281. Consequently the worker who may be most in need of unemployment insurance has no entitlement to benefits.

Thus the "crucial factor" of need which was dispositive in *Goldberg* cannot have the same impact in deciding the question of due process in unemployment insurance cases. While we cannot ignore the fact that some unemployment insurance claimants are in fact needy, we must recognize that unemployment insurance is available to rich and poor alike and hence it is illogical to permit the right to benefits to be accelerated in direct relation to the severity of a claimant's economic situation.[8]

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7. "Unemployment compensation is greatly preferable to relief because it is given without any means test." H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). "Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis but only while the worker is involuntarily unemployed." S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).

8. Clearly, the "brutal need" mentioned in *Goldberg* does not predominate in unemployment insurance. In 1968, for example, 43% of eligible claimants received the maximum weekly benefit amount. The average earnings of such claimants was $8,329 annually.

The difference between welfare and unemployment insurance with respect to need was pointed out by a noted authority who stated, ". . . *public assistance* programs provide benefits according to individual and demonstrated budgetary needs and are usually financed from so-called general revenues, i.e., tax impositions of the direct or excise type without particular connection between the class of taxpayers or transactions bearing the burden and the class of recipients benefited by the program. *Social insurance,* on the other hand, is characterized by benefits which are payable without proof of need and is usually financed, at least in part, by either the prospective beneficiaries themselves or a class of taxpayers upon whom these beneficiaries are economically dependent or both . . ." Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies Of Protection Against Wage Loss,* 8 Vand. L. Rev. 218, 223 (1955). The distinction is of considerable importance since a delay of payments in a program predicated primarily on need may be intolerable while less protracted delays under other programs where need is not strictly relevant may be within constitutional limits.

III. The Decision In This Case Will Have Nationwide Significance.

Currently forty-eight jurisdictions other than California utilize a procedure virtually identical to California Unemployment Insurance Code section 1335. Should plaintiffs prevail here the annual unrecoverable loss to employers of the State of California could be as high as $800,000. Nationwide the loss would obviously be in the millions of dollars. Moreover, the certification of the Secretary of Labor of forty-nine state programs would be immediately imperiled.

More significantly, the *Java* case has spawned a rash of other lawsuits challenging a stay of benefits under facts

similar but not identical to those in this case. For example, in *McCrae v. California Department of Human Resources Development,* N.D. Cal., No. C-70 1146 ACW, a claimant was initially found ineligible but this determination was reversed by a referee who found the claimant eligible. The Department did not pay benefits pending the employer's appeal to the Unemployment Insurance Appeals Board. Brandishing the *Java* decision of the District Court, plaintiffs in *McCrae* have attacked the state's suspension of benefits. Cases presenting other issues based on *Java* include *Hicks v. California Department of Human Resources Development,* Contra Costa County Superior Court No. R-18243 (Cal.); *Crow v. Shultz,* N.D. Cal., No. C-70 1128 ACW; *Coronado v. California Department of Human Resources Development,* Los Angeles County Superior Court No. 974004; *Torres v. New York State Department of Labor,* 70 Civ. 2408, S.D.N.Y.; *Ahnne v. Department of Labor Industrial Relations of Hawaii,* Cir. Ct. No. 31058.[9]

Other states have indicated their concern by stating their desire to join as amici curiae at some point in these proceedings. To date these states include: Colorado, Delaware, Hawaii, Idaho, Illinois, Kentucky, Maine, Maryland, New Hampshire, Oregon, Ohio, Tennessee, Texas, and Utah. Prominent employer organizations in both California and New York have indicated a similar intent.

Considering the fact that in California alone there were some 960,000 claims for unemployment insurance, it is no exaggeration to state that the *Java* decision and its progeny will severely clog and impede state administration of un-

9. In an unrelated field, the case has also been cited by a workmen's compensation claimant who argues his temporary disability payments should not be terminated without a prior hearing. See *Galli v. Familian Pipe and Supply Co. of Los Angeles, et al.,* Alameda County, Cal., 69 OAK 30280.

employment insurance programs and will unfairly tax the employers who will be required to pay at a considerably higher rate than has heretofore been necessary.

An application of the *Goldberg* decision to all unemployment insurance claimants would results in an annual unrecoverable loss to the employers of California of between $17.8 million and $166.4 million. See Affidavit of Nicolo Pino, dated July 20, 1970, attached hereto as Appendix C.

IV. A Court Should Save the Constitutionality of a Statute Whenever Possible.

A cardinal principle of statutory construction is that a statute should be saved whenever possible and not destroyed. *Labor Board v. Jones and Laughlin,* 301 U.S. 1, 30 (1937); *U.S. v. Menasche,* 348 U.S. 528, 538 (1955); *Epstein v. Helvering,* 120 F.2d 427 (1941). As the United States Supreme Court has stated, "It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose." *Communications Association v. Douds,* 339 U.S. 382, 407 (1950); See also *Antilles Surveys, Inc. v. De Jongh,* 358 F.2d 787; *cert. denied,* 385 U.S. 900 (1966); See generally 16 C.J.S., Constitutional Law, §§ 92-101.

In the instant case, plaintiff's real objection is that the withholding of payments pending an employer appeal results in an inordinate delay and that the claimant, even if eventually victorious, nevertheless must wait for payment for an unreasonable length of time. What is reasonable or unreasonable, of course, depends on the circumstances of each case. In the *Goldberg* case, for example, the delay occasioned by the withholding of payments was some four months and the court concluded that a delay of this length was unreasonable. In the instant case, however, the delay is

on the average approximately seven or eight weeks, a del
which is not unreasonable in light of the problems of
ministering a program of this magnitude. In any event
court below could easily have framed an order to the eff
that the statute, while not unconstitutional on its fa
nevertheless had been unconstitutionally applied in that
delay occasioned by section 1335 was unreasonable to
point of denying due process to a claimant. The court co
well have issued a guideline for the department indicati
that a lesser delay would promote the purpose of
statute while at the same time permit the claimant to ha
a speedy decision and not be seriously inconvenienced. T
court's duty in this respect is underscored by the fact th
most other states have a statute similar to section 1335 a
the ruling in the instant case will indubitably encoura
similar attacks on statutes across the nation. Under su
circumstances, it is urged that a court should be particular
reluctant to rule that a state statute is unconstitutional.

CONCLUSION

For the reasons stated this Court should note probabl
jurisdiction.

DATED: August 6, 1970

Respectfully submitted,

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Appendix A

In the United States District Court for the Northern District of California

Filed—May 14 1970
Clerk, U.S. Dist. Court, San Francisco

Case No. C-69 350 ACW

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated,

Plaintiffs,

vs.

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development; Esther Perry, as Manager the Pittsburg, California branch of the California Department of Human Resources Development; Ramon L. Jimenez as Manager of the Richmond, California branch of the California Department of Human Resources Development,

Defendants.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Before: Jertberg, U.S. Circuit Judge; and Zirpoli and Wollenberg, District Judges.

This is a challenge, on both statutory and constitutional grounds, to certain aspects of the California unemployment compensation program. This program, certified by the Sec-

retary of Labor under the provisions of the Social Security Act (42 U.S.C. § 503), provides for the payment of insurance benefits, over an extended period of time, to persons who find themselves unemployed "through no fault of their own". Calif. Unempl. Ins. Cde. § 100. These payments begin after an initial determination of eligibility by an eligibility interviewer who is directed to consider all information submitted by the claimant, his former employer, and others. Calif. Unempl. Ins. Cde §§ 1326 et seq. If this initial determination is favorable to the claimant, payments begin immediately. The employer, however, is then given ten days in which to appeal; if an appeal is filed, benefits are stopped pending decision on the appeal without any provision for a pre-termination hearing. Calif. Unempl. Ins. Cde. § 1335. It is this statutorily directed stoppage of benefits without prior notice and hearing which is under challenge by plaintiffs.

Plaintiffs' argument is three-fold. First, it is said that since the median delay in resuming payments after an employer has invoked § 1335 is about seven weeks, the California program conflicts with certain clearly defined national and state goals. The California scheme is intended to stave off extreme personal hardship as well as society-wide depression in times of increasing unemployment. See Calif. Unempl. Ins. Cde. §§ 100-101. This end is clearly thwarted when a claimant must wait some fifty days for payments to resume. Second, the California statute is said to violate the federal law which directs that state unemployment compensation programs must be "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). Third, it is argued that the denial of benefits, without a prior hearing, to persons who have already been found initially eligible for such benefits violates plaintiffs' rights to due process

of law under the federal constitution. Most relevant to this is the Supreme Court's recent decision in *Goldberg v. Kelly*, ... U.S. ..... (1970).

The constitutional aspects to this challenge to § 1335 warranted the appointment of a three-judge court. 28 U.S.C. § 2284.

Plaintiffs' three arguments are, in fact, nearly co-extensive. The "payment when due" directive of the Social Security Act is indicative of a congressional desire to help the jobless when they need it most. It can also be read as a reiteration of the classic due process standard, i.e. when a person has been found entitled to a government benefit, this benefit in most cases cannot be taken away without certain pre-termination procedures being followed.[1] It seems best, therefore, to analyze the operation of the California system in order to determine when an individual claimant is "entitled" to unemployment compensation. If payments are "due", deprivation of those payments without a prior hearing would raise questions under both the federal statute and the Constitution. Most simply, when is "when due"?

The parties herein have entered into a stipulation which does much to clarify the actual practices of the State Department of Human Resources Development. A claimant for unemployment insurance benefits must initially file Forms DE 1101, 1426 and 3893. These forms, taken together, apprise the eligibility interviewer of the basis

---

1. An entitlement to unemployment insurance benefits or welfare payments is no different from the due process standpoint than an entitlement to a pension, or a farm subsidy, or a professional license to practice. Once a person's qualification for the benefit is shown, it cannot be arbitrarily denied, or withdrawn, without due process standards being fulfilled. See *Goldberg v. Kelly, cit. supra*, note 8; and Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 Harv. L.R. 1439 (1968).

of the claim, the name of the claimant's previous employer, the reason for his no longer working, his work experience, and so on. The question most frequently basic to disputed cases, i.e. the claimant's reasons for no longer working, is answered on DE 1101 and copies of this form are immediately sent to the previous employer for verification. The employer is then bound to submit, within ten days, "any facts then known which may affect the claimant's eligibility for benefits". Calif. Unempl. Ins. Cde. § 1327. If the employer raises an issue as to eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job.

All of this tends to show that the eligibility interviewer has at his disposal information from both employer and claimant prior to the "Eligibility Benefit Rights Interview", at which he speaks personally with the claimant. The interviewer has, according to the Local Office Manual used in California, the duty "to seek from any source the facts required to make a prompt and proper determination of eligibility". The actual decision may be suspended an additional ten days to get further information. If employer statements leave certain questions unresolved, the employer "must be given an opportunity to provide additional information". L.O.M. §§ 1400.3; 1400.5. At the interview itself, the interviewer is told to make "telephone contact with other parties . . . ." if at all possible. L.O.M. 1404.4. Interested persons must be allowed to "confirm, contradict, refute, or explain any evidence [which is relevant]". L.O.M. § 1404.4.

The eligibility interviewer must, then, consider the evidence presented by all sides and make a "determination" or "determination ruling" as to eligibility. There seems little question that this is the critical point in the California

procedure. The Department itself proclaims that "[t]he determination is the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible". L.O.M. § 1400.1. Payments begin upon this decision, and for 95% of claimants, no further problem arises as to initial eligibility.

Defendants, however, argue that payments are not in fact "due" until another ten days passes without the employer appealing. This flies in the face of actual Department practice, which is to begin payments immediately upon the initial determination of eligibility and to stop them later upon an employer appeal.[2] The appeal Form DE 1000, upon being filed, halts payments. No hearing is held; no chance is given the claimant to rebut, even in writing, new information offered by the appellant. It is clear that in California payments become "due", and are paid, upon the favorable decision of the eligibility interviewer. It is only subsequently, generally after two payments have been made, that an employer appeal will result in automatic stoppage.

"When due" is, then, upon the initial determination of eligibility. At that point, all parties have been heard, evidence has been collected, and an adjudication made. This being the case, California's provision allowing benefits to be stopped without any pre-termination procedures raises serious due process questions. And the continued arrest of payments for a median period of seven weeks similarly causes doubt as to whether California's program

2. "At least since 1948 . . . the Department of Human Resources Development . . . has paid out unemployment compensation benefits to claimants immediately after such claimants have been determined eligible by a determinations interviewer". Parties' Stipulation, filed April 14, 1970.

is "reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1).

This Court finds the present case indistinguishable from *Goldberg v. Kelly, cit. supra.* See also *Wheeler v. Montgomery,* .... U.S. .... (1970). *Goldberg* challenged the right of a State to terminate welfare benefits without a prior evidentiary hearing at which the recipient is given the chance to confront adverse witnesses and present his own evidence, verbal or written. As here, the defendants in *Goldberg* argued the State's interest in protecting public funds. The Supreme Court, balancing this interest against the interest of the welfare recipient in having the necessities of life while the bureaucracy mulls over his continued eligibility, found the fiscal argument somewhat weak, and rejected it. Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in *Kelly v. Wyman,* 294 F. Supp. 893 (1968), and the garnishee in *Snaidach* [sic] *v. Family Finance Corp. of Bay View, et al.,* 395 U.S. 337 (1969).

Further, the defendants' efforts to distinguish this case from the constitutional reasoning of *Kelly* and *Snaidach* only serve to point up the validity of the statutory grounds argued by plaintiffs. The most fundamental purpose of both the federal and the state unemployment compensation laws is "to *prevent* the burden of injured employees becoming charges upon society". *Abelleira, et al. v. The District Court of Appeal, etc.,* 17 C.2d 280, 300 (1941);

Calif. Unempl. Ins. Cde. §§ 100-01.[3] Defendants urge that public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. This was certainly the primary reason for 42 U.S.C. § 503 (a)(1) and the requirement that State programs assure full payment of benefits "when due". Yet some five thousand *eligible* recipients each year in California find their payments halted for a median period of seven weeks. Since the average period of unemployment in California is, according to uncontested argument before this Court, some nine weeks, it is clear that as to these people, payments are not made "when due", and the fundamental intent and policy of the Social Security Act are thwarted.

Accordingly, this Court finds Calif. Unempl. Ins. Cde. § 1335 defective on both constitutional and statutory grounds. By not providing for a pre-termination hearing, it runs counter to the principles enunciated in *Goldberg v. Kelly, cit. supra.* And by being applied so as to result in a median seven week delay in payments to claimants who have been found eligible for such payments, the California statute violates the directive of 42 U.S.C. 503(a)(1).

Therefore, *IT IS HEREBY ORDERED* that defendants, their successors in office, agents, and employees, be, and

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3. The total inadequacy of locally administered charity in times of nation-wide cyclical unemployment led sponsors of unemployment insurance legislation to urge upon Congress a purely federal scheme. Political and legal considerations resulted, however, in the present federal-state setup, with the federal government imposing many standards to be followed by the States. Among these standards was the requirement of payment of claims "when due". On the legislative history, see generally Witte, *Development of Unemployment Compensation,* 55 Yale L.J. 21 (1945). See also Note, *Charity vs. Social Insurance in Unemployment Compensation Laws,* 73 Yale L.J. 334 (1963); *Rivard v. Bijou Furniture Co.,* 27 A. 2d 853 (1942); *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87 (1937).

are, enjoined, during the pendency of this action, from enforcing that part of Calif. Unempl. Ins. Cde. § 1335 which provides that "[i]f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision". Defendants, their successors in office, agents, and employees, shall not suspend unemployment benefits due plaintiffs and members of their class on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly, cit. supra.*

Execution of this Order will be stayed ten (10) days from the date of its filing. Any further stay will be granted only upon a proper motion and showing by defendants.

Dated: April 11, 1970

/s/ GILBERT H. JERTBERG
United States Circuit Judge

/s/ ALFONSO J. ZIRPOLI
United States District Judge

/s/ ALBERT C. WOLLENBERG
United States District Judge

Appendix B

§ 503. State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b) of Title 26), immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of

administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b) of Title 26:

Provided, That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further,* That the amounts specified by section 1103(c) (2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 502 of this title, which, because of any action

or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor for the proper administration of such State law.

(b) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided,* That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: *Provided further,* That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law—

(1) That such State does not make its records available to the Railroad Retirement Board, and furnish to the Railroad Retirement Board at the expense of the

Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes; or

(2) That such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

Aug. 14, 1935, c. 531, Title III, § 303, 49 Stat. 626; June 25, 1938, c. 680, § 13(g), 52 Stat. 1112; June 20, 1939, c. 227, §18, 53 Stat. 848; Aug. 10, 1939, c. 666, Title III, § 302, 53 Stat. 1378; 1946 Reorg.Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 10, 1946, c. 951, Title IV, § 416(c), 60 Stat. 991; 1949 Reorg.Plan No. 2, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; Aug. 28, 1950, c. 809, Title IV, § 405(b), 64 Stat. 560; Aug. 5, 1954, c. 657, § 5(a)(1), 68 Stat. 673.

Appendix C

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United States District Court for the Northern District of California

No. C-69 350ACW

Judith Java, et al.,
Plaintiffs,

vs.

California Department of Human Resources Development, et al.,
Defendants.

AFFIDAVIT

I, Nicolo Pino, the undersigned, having been duly sworn, do depose and state that:

1. I am the Acting Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California; and I have, in my possession and under my control, the statistical records of the said Department of Human Resources Development relating to unemployment insurance determinations made, appeals filed with referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals, the amount of unemployment insurance benefits paid by

said department from the Unemployment Fund, and the amount of said unemployment insurance benefits paid to claimants ineligible for said benefits and not recovered.

2. The statistical records of the Department of Human Resources Development indicate the following determinations made, referee appeals, benefit activity, and benefits paid to claimants ineligible for said benefits and not recovered:

A. During the year 1969, 404,930 determinations were made by the department disqualifying claimants from receiving unemployment insurance benefits.

(1) Approximately 28 percent of the determinations, or 113,395, were made disqualifying claimants because they had insufficient wages in their base period to file a valid claim.

(2) Approximately 34 percent of the determinations, or 139,274, were made disqualifying claimants who had sufficient wages in their base period to file a valid claim but who had left their last employment under disqualifying conditions.

(3) Approximately 38 percent of the determinations, or 152,261, were made disqualifying claimants in "claim status", that is, in the process of filing a weekly claim for unemployment insurance benefits as opposed to a new or additional claim.

B. During the year 1969, 395,740 determinations were made by the department holding claimants with valid claims eligible for unemployment insurance benefits. Approximately two percent, or 8,315, of these determinations were appealed to a referee by the claimant's last employer. Of the appeals to referees by employers, approximately 2,990 were decided in favor of such employer.

C. During the year 1969, the average weekly unemployment insurance benefit paid was $52.

D. During the year 1969, the median time elapsed between filing an appeal to the California Unemployment Insurance Appeals Board and receiving a decision by a referee of said Board was 42.1 days, or 6.0 weeks.

E. During the years 1965 through the year 1969, an average of thirty-six percent of the unemployment insurance benefits paid to claimants not eligible for said benefits were not recovered.

F. Using the above figures contained in paragraphs A through E, it is my estimation that if disqualified claimants should be paid benefits until given a referee hearing and if claimants held eligible should be given a hearing on the appeal by their last employer before benefits may be suspended, the approximate minimum effect on the Unemployment Fund will be a loss of either $49,383,360 or $17,778,010 in unemployment insurance benefits paid to claimants and not recoverable. This minimum effect is based upon the following mathematical formula:

(1) Pursuant to Unemployment Insurance Code Section 1328, all parties have ten days or 2.0 weeks to appeal an adverse determination and therefore benefits will have to be paid to disqualified claimants for at least two weeks resulting in 404,930 claimants receiving an average of $52 for two weeks equaling $42,113,000 in benefits paid out;

(2) Out of the 404,930 disqualified claimants in the year 1969, 30,004 appealed the department's determination and therefore would have to be paid benefits for a period of six weeks at a rate of $52 a week, before a referee of the California Unemployment Insurance Appeals Board issues a decision, or an amount of $9,361,248;

(3) The 8,315 claimants held eligible by the department subject to the employer's appeal to a referee would receive $52 benefits for six weeks, or an amount of $2,594,280;

(4) However, out of the 30,004 claimants who appealed in 1969, 7,268 were successful on appeal and therefore were entitled to all benefits received for both the two-week period prior to the filing of an appeal and the six-week period prior to the referee decision resulting in an amount of $3,023,488 correctly paid which is subtracted from the amount of all benefits paid;

(5) Out of the 8,315 claimants found eligible by the department subject to an employer appeal to a referee, 5,325 are dismissed or decided in the claimant's favor and therefore those claimants were entitled to all benefits received for the six-week period prior to the referee's decision resulting in an additional amount of $1,661,400 correctly paid;

(6) Adding the amount paid out in benefits prior to the filing of an appeal by the claimant (subparagraph 1), the amount paid out to disqualified claimants prior to the referee decision on their appeal (subparagraph 2), and the amount paid out to eligible claimants prior to the referee decision on their employer's appeal (subparagraph 3), and substracting the amounts paid to claimants who prevailed in their or the employer's appeal (subparagraphs 4 and 5), the result is $49,383,360 in benefits paid to claimants found ineligible for such benefits;

(7) If it is determined under Section 1375 of the Unemployment Insurance Code that it is against equity and good conscience to recover amounts paid to claimants in these circumstances, the minimum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be $49,383,360;

(8) If it is determined under Section 1375 of the Unemployment Insurance Code that it is not against equity and good conscience to recover amounts paid to claimants in

these circumstances, the minimum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be thirty-six percent of $49,383,360 or $17,778,010 of said benefits which are not recoverable.

G. Using the above figures contained in paragraphs A through F, it is my estimation that if such claimants should be entitled to a referee hearing prior to the denial of benefits, the approximate maximum effect on the Unemployment Fund would be a loss of either $166,360,272 or $59,889,698 in benefits paid out to claimants and not recoverable. This maximum effect is based upon the following mathematical formula:

(1) Assuming that all 404,930 disqualified claimants appeal the department's adverse determinations, benefits would have to be paid out to such 404,930 claimants for the full eight-week period, that is, the two-week period allowable for filing an appeal plus the six-week period that elapses between the filing of appeal and the referee's decision, multiplied by $52, the average benefit amount paid, to give an amount of $168,450,880 benefits paid;

(2) Added to this amount is the amount of $2,594,280 which represents benefits paid to claimants held eligible by the department subject to the employer's appeal (see subparagraph F (3), above) to equal $171,045,160 in benefits paid;

(3) However, subtracted from this amount of benefits paid, will be the amount of $4,684,888 paid to the claimants held eligible for such benefits (see subparagraphs F (4) and F (5) above) leaving an amount of $166,360,272 paid out to ineligible claimants;

(4) If it is determined under Section 1375 of the Unemployment Insurance Code that it is against equity and good conscience to recover amounts paid to ineligible claim-

ants in these circumstances, the maximum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be $166,360,272;

(5) If it is determined under Section 1375 of the Unemployment Insurance Code that it is not against equity and good conscience to recover amounts paid to ineligible claimants in these circumstances, the maximum effect on the Unemployment Fund should such claimants be entitled to a referee hearing prior to the denial of benefits would be thirty-six percent of $166,360,272 or $59,889,698 of said benefits which are not recoverable.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ NICOLO PINO
NICOLO PINO

State of California
County of Sacramento—ss.

Nicolo Pino being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 22nd day of July, 1970.

/s/ SYDNEY R. JOHNSON
Notary Public in and for the
State of California

FILE COPY

Supreme Court, U.S.
FILED
AUG 12 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. ...507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT; GILBERT SHEFFIELD as Director of the California Department of Human Resources Development; ESTHER PERRY, as Manager of the Pittsburg, California branch of the California Department of Human Resources Development; RAMON L. JIMENEZ as Manager of the Richmond, California branch of the California Department of Human Resources Development,

Appellants,

against

JUDITH JAVA and CARROLL H. HUDSON, individually, on behalf of themselves and all others similarly situated,

Appellees.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

No. .....

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT; GILBERT SHEFFIELD as Director of the California Department of Human Resources Development; ESTHER PERRY, as Manager of the Pittsburg, California branch of the California Department of Human Resources Development; RAMON L. JIMENEZ as Manager of the Richmond, California branch of the California Department of Human Resources Development,

Appellants,

against

JUDITH JAVA and CARROLL H. HUDSON, individually, on behalf of themselves and all others similarly situated,

Appellees.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Interest of *Amicus*

The State of New York administers, through its federally approved Unemployment Insurance Law (New York Labor Law §§ 500-635), probably the largest unemployment insurance program in the country. This program would be profoundly affected if the decision of the court below were upheld. Because the decision below has such vast impli-

cations for the State of New York, we file this brief as *amicus curiae* pursuant to Rule 42(1) of the Revised Rules of this Court and urge this Court to note probable jurisdiction of this appeal.

Statement

A three-judge district court sitting in the Northern District of California has granted a preliminary injunction finding Calif. Unempl. Ins. Cde. § 1335 "defective on both constitutional and statutory grounds" because it does not provide for a hearing prior to termination of unemployment insurance benefits. The decision involves two persons who were declared eligible for unemployment insurance benefits and payments to them were commenced. However, their employers appealed the eligibility determinations and, pursuant to California law, payments were ceased pending the appeals. The District Court found the case to be "indistinguishable" from the decision of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254, and held that termination without a hearing violated both the statutory requirement that payments be made "when due" (42 U.S.C. § 503[a][1]) and due process considerations set forth in the *Goldberg* v. *Kelly* case.

ARGUMENT

The holding of the District Court will have a substantial adverse impact upon the administration of unemployment insurance programs throughout the country.

A

Although the decision below deals factually only with cases in which the employer appeals a finding of eligibility for unemployment insurance benefits, its reasoning and

language go much further. The District Court found the California statute defective for failure to provide a "pre-termination hearing". Unemployment insurance offices in New York, as in California, the District of Columbia, and most other states in the Union, terminate unemployment insurance benefits for a variety of reasons. Thus, benefits may be terminated because an employer appeals the determination of eligibility or because information comes to the unemployment insurance office which was unavailable at the time of the initial determination but which would render the applicant ineligible. Payments may be terminated because the recipient fails to maintain his eligibility by being ready, willing and able to work or by failing to report to his claims office. All of these situations might be encompassed within the holding below.

Indeed, the decision below has already had substantial effect. There is presently pending in the United States District Court for the Southern District of New York a suit based on the decision below and the decision of this Court in *Goldberg* v. *Kelly, supra,** challenging the New York State policy of terminating benefits following a statutory re-determination (New York Labor Law § 597[3]), that a claimant who was initially determined to be eligible for benefits and to whom some payments had been made was, in fact, not eligible. *Torres* v. *New York State Department of Labor,* S.D.N.Y. 70 Civ. 2048. In *Torres,* notice of the claim from the insurance office to the employer first went astray and the correct information respecting

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* New York, represented by its Attorney General, while a party to the action in the District Court, did not join in the appeal because of its limited applicability to termination of welfare. The untenable extension of the *Kelly* case to the area of unemployment insurance would create monumental havoc. No basis for such extension would appear to be justified by the opinion of this Court. Despite this the *Kelly* case is being applied by the courts as insisting upon adversary hearings prior to cessation of any benefit so long as any governmental interest in some way appears.

the reason for termination of employment did not reach the unemployment office before the initial determination of eligibility was made. When the information was received and investigated, payments were terminated. The single district judge in *Torres* has held, in a decision based in part on the decision in this case, that the complaint presents a substantial federal question with respect to whether payments may be terminated without a prior hearing. *Torres* v. *New York State Department of Labor*, July 21, 1970 (LASKER, J.). The complaint in *Torres* has recently been amended to include a plaintiff to whom payments were discontinued because of his unavailability for employment.

B

In addition to the multiplicity of fact patterns which the decision below has already been held to affect, its most devastating impact could be to delay all payments of unemployment insurance benefits. In New York, in 1969, some 790,000 original claims for unemployment insurance benefits were filed. The primary object in processing all such claims is expedition. By statute, an initial determination should be made within one week of the application. New York Labor Law § 597(2). Thus, payments to eligible claimants can begin as promptly as possible. New York, like California, the District of Columbia, and other states in the Union, also provides as a concomitant of prompt commencement of payment, that, if, for any reason it is determined that payments should not have been commenced, they must be stopped. Without this re-determination mechanism, it could be necessary to have full scale evidentiary hearings not only before payments are terminated but before they are begun. This would mean that payments would inevitably be delayed and that the cost of administering the unemployment insurance program would

be enormously increased. This would be true whether the request for re-determination or for a hearing came from the employer who has a direct pecuniary interest in the payment of funds (see jurisdictional statement) or whether any initiative for re-determination came from the agency itself in its capacity as administrator of the unemployment insurance fund. Certainly, a pre-eligibility hearing would comply with the letter of due process but it would violate its spirit and work unnecessary hardship on the vast majority of claimants for unemployment insurance.

C

The instant case also raises serious questions concerning the scope of the decision of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254. The District Court found that decision "indistinguishable" from the instant case. However, as the jurisdictional statement points out, there are significant differences between unemployment insurance and welfare benefits and the administration of both programs which make it imperative that this Court reject the extension of *Kelly* made by the court below. Not only is *Kelly* distinguishable in the context of determination of initial claims for unemployment insurance benefits, but it is also distinguishable from the situation where a claimant becomes ineligible by virtue of his failure actively to seek work or to report to his claims office. For, unlike the situation in welfare cases, unemployment eligibility is re-determined on a week by week basis since each claimant must be ready, willing and able to work each week and, of course, must not have become re-employed. It would, of course, be impossible to hold hearings each week on the eligibility of each claimant for the past week. (In New York in 1969 some 7,880,000 weeks of benefits were paid.) Accordingly, these continued claims are promptly determined either in favor of or against the claimant with the right to a subse-

quent hearing. This procedure too protects the vast majority of claimants and delays only a very few. The implications of the decision below would delay all claims.

CONCLUSION

For the foregoing reasons and for the reasons stated in the jurisdictional statement, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 7, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, ET AL.,

Appellants,

v.

JUDITH JAVA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE STATE OF MARYLAND, AS AMICUS CURIAE

INTEREST OF THE AMICUS

The filing of the Appellants' jurisdictional statement occasioned by the decision of the three-judge court sitting as the United States District Court for the Northern District of California,* has raised legal questions that will inevitably have a momentous effect on every state's administration of its unemployment insurance program, and, more

* Not officially reported, but is contained as Appendix A to Jurisdictional Statement of Appellants.

specifically, on the unemployment insurance program of the State of Maryland, which is administered by the Maryland Department of Employment Security under the State Act.[1] Although the provision in the Maryland law which postpones the payment of benefits pending adjudication of an appeal from an initial determination by an examiner[2] does not employ the identical language of Section 1335[3] of the California unemployment insurance law which is under attack, the legislative objectives of the two provisions are similar and any final judicial decision construing the California statute directly affects administrative implementation of the Maryland Statute. The State of Maryland, without opining on the merits of the specific controversy between the principal litigants which culminated not only in

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[1] (Unemployment Insurance Law of Maryland) Laws of Maryland, Second Extraordinary Session, Dec., 1936, c. 1, Maryland Ann. Code, Art. 95A, Section 1, et seq. (1969).

[2] (a) The pertinent provisions of the Maryland statutory scheme are contained in Maryland Ann. Code, Art. 95A, Sec. 7, *Claims for Benefits*, subsection (i) (1969):

> *"Benefits shall be promptly paid in accordance with a determination except that, if the record of the proceeding on the claim indicates that a disqualification has been alleged or may exist, such benefits shall not be paid prior to the expiration of the period for appeal.* If pursuant to a determination benefits are payable in any amount as to which there is no dispute, such amount of benefits shall be promptly paid regardless of any appeal. The commencement of a proceeding for judicial review shall not operate as a supersedeas or stay unless the Board of Appeals shall so order. If a determination of an examiner allowing benefits is affirmed by a referee, or if a determination of a special examiner or a decision of a referee allowing benefits is affirmed by the Board of Appeals, such benefits shall be promptly paid regardless of any further appeal." (Emphasis added.)

(b) In contrast with California's ten-day appeal period, Maryland employs a seven-day period. Maryland Ann. Code, Art. 95A, Sec. 7(e) (1969).

[3] That language being: "If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision" [followed by enumerated exceptions not applicable here and thus not set forth]. Calif. Stats. 1953, c. 308, p. 1509, Sec. 1335.

the District Court's criticism of California's particular administrative modus operandi of Section 1335 but its total invalidation, finds more substantial legal questions created but left unresolved by the lower tribunal than resolved by it, all of which causes a morass for any state attempting to legislate workable procedural machinery in supplementation of the aims of the Federal Social Security Act.[4] Because Maryland believes that any judicial inquiry into the legality of a state's established administrative machinery for the payment of benefits in a unique field such as that of unemployment insurance should be initiated, if at all, in a spirit of resolution and not dissolution, and concluded, if at all, with meaningful adjudication, accompanied by specific guidelines and procedures adaptable to the administrative realities of unemployment insurance as opposed to the administrative exigencies of general welfare and relief programs, it urges the granting of the Appellants' quest for plenary review and oral argument in this Court.

ARGUMENT

I.

MINIMUM STANDARDS OF JUSTICE DICTATE THAT ANY FINAL ADJUDICATION OF THE NONCONFORMITY OF THE CALIFORNIA LAW TO THE FEDERAL REQUISITES OF THE SOCIAL SECURITY ACT SHOULD REFLECT EXHAUSTIVE CONSIDERATION OF THE POSITION OF THE SECRETARY OF LABOR.

With the exception of initial acknowledgment that the California unemployment compensation program had been certified by the Secretary of Labor under the provisions of the Social Security Act, the opinion of the three-judge district court holding Section 1335 to be defective on statutory grounds is noticeably devoid of any consideration of the official administrative position of the Secretary of Labor

[4] Act of August 14, 1935, c. 531, 49 Stat. 620, as amended, 42 U.S.C. §301-1305.

insofar as the existence in state unemployment compensation laws of a system of adjudication of contested claims which allows postponement of benefits pending final adjudication. It is Maryland's considered position that any final holding of nonconformity by the judiciary should, at the very least, be flanked with the benefit of the expertise of the very federal agency which has as one of its primary objectives the scrutinizing of a state's "methods of administration" so as not to run afoul of federal standards.[5] A decision of such importance to the national administration of state unemployment compensation laws should not be one delivered in vacuum, especially when it is recognized that the federal agency prepared and took draft bills to the various state legislatures to enable and induce them to pass unemployment insurance laws providing for compensation in accordance with federal requirements.[6] Although the majority opinion of this Court in *Rosado v. Wyman*, 397 U.S. 397, 420 (1970), one of the many controversies finding its way to this Court dealing with the compatibility of state social services programs with the Aid for Dependent Children Provisions of the Social Security Act rejected the argument that a federal court was with-

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[5] 49 Stat. 626, 42 U.S.C., Sec. 503(a)(1) provides: *"The Secretary of Labor shall make no certification* for payment *to any State unless he finds that the law of such State,* approved by the Secretary of Labor under the Federal Unemployment Tax Act, *includes provision for—*

> (1) *Such methods of administration* (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) *as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . ."* (Emphasis added.)

[6] See Justice Butler's dissenting opinion in *Steward Mach. Co. v. Davis*, 301 U.S. 548, 616 at 618 (1937); see, generally, House Report No. 615, 74th Congress, 1st Session; Senate Report No. 628, 74th Congress, 1st Session (1935).

out power to review state welfare provisions or prohibit the use of federal funds by the states in view of the fact that Congress had lodged in the Department of Health, Education and Welfare administrative powers to cut off federal funds for noncompliance with statutory requirements, nevertheless, in remanding the case to the district court, specifically instructed the court that its review of any revised program adopted should take into account the views of HEW. While the *Rosado* Court expressed great reluctance to find Congressional intent to foreclose judicial review of the state's administration of the HEW program, the Court may wish to re-evaluate its position on that issue insofar as the position of the Secretary of Labor as overseer of state unemployment compensation programs. Although the Maryland administration may be drawn to the logic of Mr. Chief Justice Berger and Mr. Justice Black, who, in commenting on the majority position of this Court's sanctioning judicial review in the A.F.D.C. welfare line of cases concluded that "judicial pre-emption of the agency's (HEW) rightful responsibility can only lead to the collapse of the enforcement scheme envisioned by Congress,"[7] it is neither necessary nor the purpose of this brief to venture into the merits of that position, since this Court in *Dandridge v. Williams*, 397 U.S. 471, 481-482 (1970), another of the A.F.D.C. regulated state welfare benefit controversies, placed direct reliance on the position of the Secretary of Health, Education and Welfare as to the approval of the Maryland State welfare plan in ruling that the particular Maryland regulation under attack was not prohibited by the Social Security Act. See also the concurring opinion of Mr. Justice Douglas, *King v. Smith*, 392 U.S. 309, 334 (1968), wherein reluctance was expressed to follow the statutory route travelled by the majority in con-

[7] *Rosado v. Wyman*, 397 U.S. 397, at 434 (1970).

cluding that an Alabama statewide regulation promulgated in administration of its federally funded A.F.D.C. program was in conflict with the Social Security Act of 1935, in view of the "long-standing administrative construction" by HEW which had approved other state A.F.D.C. plans containing the provision under attack.

Judicial review and further hearing by this Court, coupled with exploration of the position of the Secretary of Labor on a question of such national importance to the administration of the states' unemployment insurance programs, is certainly preferable to a lower court decision markedly absent serious consideration of the Secretary's position.

II.

INVALIDATION BY THE DISTRICT COURT OF SECTION 1335 OF THE CALIFORNIA STATUTE ON BOTH CONSTITUTIONAL GROUNDS OF DUE PROCESS INFRINGEMENT AND STATUTORY GROUNDS OF NONCONFORMITY WITH THE SOCIAL SECURITY ACT COMPELS FULL REVIEW BY THIS COURT.

The opinion of the district court found Section 1335 of the California Code defective on due process infringement grounds on the basis that the California law fails to provide for pre-termination hearing procedures contrary to the principles recently laid down by this Court in *Goldberg v. Kelly*, 397 U.S. 254, 266-271 (1970). In fact, it is this broad swath approach by the district court directing state unemployment insurance administrators to incorporate by reference the pre-termination hearing procedures enunciated in *Goldberg, supra*, which were formulated in the atmosphere of the peculiar setting of administrative coordination of welfare payments into the equally unique field of unemployment insurance administration, all without consideration to the innumerable differences in the two programs not only in underlying social and economic

philosophy but in administrative objectives that, unless clarified by this Court, threatens to make havoc of each state's administration of its program. What guidelines does any state unemployment insurance administrator now follow to assure constitutional conformity of a pre-termination hearing? The opinion of the district court is sorely deficient in answers to such questions. This Court decided *Goldberg* on a very narrow issue of due process as dictated by the posture in which the case came on before the Court. A reading of the three-judge lower court decision reported as *Kelly v. Wyman*, 294 F. Supp. 893, 902 (D.C. S.D.N.Y., 1968), reveals that the district court sharpened the issue to one of singular due process constitutionality as opposed to statutory interpretation for conformity with the Social Security Act only because the Social Security Act did not apply to the majority of the original and intervening plaintiffs who instituted the action. The constitutional issue of due process infringement may not be reached if review initially directs itself to the more fundamental issue of whether or not a state law's mere inclusion, per se, of a stay of benefit payments which is handled with normal dispatch within the administrative capabilities of its particular program (in California's case, a median period of seven weeks) is necessarily violative of Section 503(a)(1) of the federal Act requiring a state program capable of insuring payment of benefits "when due." Should this Court conclude that a state's implementation of a Section 1335 provision is not inconsistent with the national ideology of running a state program "reasonably calculated to insure full payment of unemployment compensation *when due*," the rationale behind the pre-termination hearing requisites called for by *Goldberg* on due process grounds may be considered by this Court as inapplicable where the act of nonpayment of

benefits because not then "due" within the meaning of Section 503(a)(1) cannot be equated to an act of termination of such benefits within the meaning of *Goldberg*. The lower court's holding that Section 1335 is violative of due process guarantees should not escape extensive judicial review when the district court conjunctively found nonconformity invalidation.

The approach of the district court in painting over the statutory grounds with broad strokes of due process, i.e., by grounding its decision in terms of California's seven week median time lapse (a constitutional approach) as the basic criteria for finding nonconformity with the federal standard of "when due" (the statutory approach), creates the most nebulous of criteria and leaves unanswered the most obvious of innumerable questions, e.g., where between one day and seven weeks does conformity and nonconformity suddenly become apparent?

III.

THE DECISION OF THE DISTRICT COURT PLACES THE MORE FUNDAMENTAL ISSUE BEFORE THIS COURT OF WHETHER OR NOT THE CONCEPT OF DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, COUPLED WITH THE FEDERAL STANDARDS PROVIDED FOR IN THE SOCIAL SECURITY ACT, SO PREEMPT THE QUESTION OF POSTPONEMENT OF BENEFITS PENDING POSSIBLE DISQUALIFICATION SO AS TO DEPRIVE THE VARIOUS STATE LEGISLATURES OF THE RIGHT TO SET UP A SYSTEM OF ADJUDICATION OF CONTESTED CLAIMS WHICH INVOLVE POSTPONEMENT OF BENEFITS.

Much of the preceding discussion foreshadows the crucial issue which this case squarely places before the Court, that is, the right of a state to formulate reasonable administrative procedures in discharge of its dual role as a fiduciary of tax revenues which are to be used to promote

the national concepts of an unemployment insurance program and an arbitrator seeking fairness in the claimant-employer relationship.

As this Court, speaking through Justice Cardozo, remarked in *Steward Mach. Co. v. Davis*, 301 U.S. 548, at 593 (1937), wherein the constitutionality of the unemployment insurance tax provisions of the 1935 Social Security Act was established:

> "A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books."

and, at 595:

> "A state looking for a credit must give assurance that her system has been organized upon a base of rationality."

And, continuing, in *Carmichael v. Southern Coal Co., Carmichael v. Gulf States Paper Corporation*, 301 U.S. 495, at 510 (1937), through Mr. Justice Stone:

> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

The basic question of the right of the states to establish and administer benefit rights, benefit amounts, payment programs, waiting periods, tax rates and tax exemptions, all or most of which have been either directly or by inference recognized in *Carmichael v. Southern Coal Co., Carmichael v. Gulf States Paper Corporation,* 301 U.S. 495 (1937), are all indirectly involved in this case as this Court must draw definitive lines so as to protect the right of the states to administer their programs within the very general and inexplicit language of the federal standards and of the United States Constitution. Maryland recognizes that the law is dynamic but is reluctant to concede that due process in whatever form and the federal standards of the Social Security Act, however broad, encroach upon the right of a state to administer its unemployment insurance program complementing national objectives with a wide range of discretion.

The decision of the California district court may signify future attacks on a wide front on state unemployment insurance laws and this Court's timely guidance is needed to impede legal erosion of the very foundations supporting a state's right to administer with broad discretion its local unemployment insurance law.

Consideration of this most basic issue by the Court can best be achieved through the exercise of extensive review by this Court.

CONCLUSION

It is respectfully submitted that the judgment of the California three-judge district court raises substantial legal questions of national importance warranting plenary judicial review, including briefs on the merits and oral argument, before this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court
of the Northern District of California

Motion to Affirm

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Motion to Affirm

Appellees, Judith Java, et al., respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Supreme Court, to affirm the judgment below on the ground that the questions are so unsubstantial as not to warrant further briefs and argument.

ARGUMENT

I. Unless There Is Some Fundamental Distinction Between Public Assistance and Unemployment Insurance, the District Court Below Was Entirely Correct in Holding That Goldberg v. Kelly, 397 U.S. 254 (1970) Was Controlling in the Case at Bar.

II. The Distinctions That Appellants Raise in Order to Differentiate Public Assistance From Unemployment Insurance Are Patently Frivolous.

A. Appellants seek to distinguish *Goldberg* by stating that there was a "crucial factor of need" present in *Goldberg* that does not exist in the case at bar, and that this distinction is of such considerable importance that a delay of unemployment insurance payments is tolerable, whereas a delay of public assistance benefits is not. (J.S. pp. 13-15). This contention is in complete derogation of the legislative purposes of the unemployment insurance and public assistance programs. Both programs had their inception in the Social Security Act of 1935—a comprehensive package of legislation designed to counteract the depression. Public assistance, and particularly AFDC assistance, was created to protect that group of children in families *without* an "employable" parent. Unemployment insurance, on the other hand, was designed to benefit those families in which there was an employable adult who was temporarily unemployed because of the economic crisis. The important point is not that need was considered to be a more crucial factor in one program than in the other. It is obvious that need was an equally important factor in both situations. See e.g. Certified Record, plaintiff's Brief in Support of Motion for Preliminary Injunction, pp. 2-7. The important fact is that AFDC was created to meet one type of need and that unemployment insurance was designed to meet another type of need—and that both programs were complementary in nature and design. See e.g. *King v. Smith,* 392 U.S. 309, 327-333, (1968). Consequently, any attempt to distinguish

the two programs on the basis of need is frivolous and totally without merit.

B. Appellants further distinguish the case at bar from *Goldberg* by contending that there is an element present in the area of unemployment insurance that did not exist in the fact pattern of *Goldberg*: This is the private interest of the employer. (J.S. pp. 10-12). The Record below and appellants' own statistics reveal that this third party interest of the individual employer is an indirect one and certainly not of enough significance to substantiate the distinction that appellants have drawn. The individual employer is a member of a large class of employers. If the District Court decision appealed from is affirmed, and payment to an eligible claimant is required during the period in which the previous employer's appeal is pending, that employer will suffer no direct monetary harm. The only feasible financial loss would be a collective one, borne by and spread over all California employers. It never has been established that such a loss would occur if the Court affirms the three-judge court's decision. This, coupled with the fact that only a very small number of initial determinations of claimant eligibility are appealed by employers[1] corroborates appellees' contention that the interest of the employer has been exaggerated and that it is not a substantial ground for distinguishing *Goldberg*.

C. Appellants' final argument in distinguishing *Goldberg* from the case at bar is that, unlike in the *Goldberg* situation, a claimant's right to eligibility for unemployment insurance benefits does not vest after the initial determination of eligibility by appellant Department; they argue that this right vests only after the previous employer has been given an opportunity to appeal the initial deter-

1. Appellants have stated that in 1968 only two percent (2%) of the initial determinations favorable to claimants were appealed by employers. (J.S. p. 6, n. 1.)

mination and to have a hearing before a referee. (J.S. pp. 12-13). This precise issue—i.e. when does a claimant's right to receive benefits actually vest pursuant to California law—was before the three-judge court below. In resolving this issue, the court below carefully reviewed and analyzed the actual practices of appellant California Human Resources Development Department (J.S. App. A, pp. 3-6), and it held that under California law payments of unemployment insurance benefits became due "upon [appellant Department's] initial determination of eligibility". (J.S. App. A, p. 5).

The District Court of the Northern District of California is composed of judges especially versed in the jurisprudence of, and sitting in the State of California. Its decision that benefits become due upon an initial determination of eligibility was based upon their interpretation of California law. Such an interpretation is entitled to great weight, *Reitz v. Mealgy*, 314 U.S. 33, 39, (1941); *Wayne County Board of Review v. Great Lakes Steel Corp.*, 300 U.S. 29, (1937), and does not warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants.

On Appeal From the United States District Court
For the Northern District of California

Appellants' Supplemental Brief

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In the Supreme Court of the United States

OCTOBER TERM 1970

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JUDITH JAVA, et al.
Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants.

On Appeal From the United States District Court
For the Northern District of California

Appellants' Supplemental Brief

Pursuant to Rule 16(5) of the Supreme Court Rules, appellants file this brief as a supplement to their Jurisdictional Statement. In their Jurisdictional Statement appellants noted, at page 16, that the *Java* decision of the District Court had been cited as authority in a number of other pending cases. Among those was the case of *Crow* v. *Schultz,*

USDC, No. Calif., No. C-70 1128 ACW. On October 12, 1970, the Federal District Court for the Northern District of California issued its decision in the latter case. The decision, in the form of an Order Granting Plaintiffs' Motion For Summary Judgment, is attached hereto as Appendix A.

It would, of course, be inappropriate for appellants to address themselves here to the merits of the *Crow* decision since appellants have the opportunity to appeal that decision.[1] Appellants bring the decision to the attention of this Court in the hope that the decision will serve further to underscore the importance of this Court's noting probable jurisdiction in the instant case.

In the *Crow* case, appellants submitted an affidavit of Nicolo Pino, who is the Acting Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California. In his affidavit, Mr. Pino pointed out that the *Crow* decision would result in between $5,606,600 and $16,518,500 in *non-recoverable* benefits paid out to ineligible claimants.[2] These benefits will be chargeable to California employers, as will the added millions attributable to increased administrative costs.

While the District Court in *Crow* explicitly rejected the fiscal arguments urged by the State, nevertheless, appellants here believe such considerations are relevant. The millions of dollars involved in *Crow* illustrate the enormous implications of the *Java* decision. Moreover, as we pointed out in

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1. In contrast to *Java* which was heard by a three-judge panel, the *Crow* case was heard before a single judge, so the appeal will, of course, be made to the Ninth Circuit Court of Appeals rather than to this Court.

2. Mr. Pino's affidavit is lengthy and replete with various calculations, most of which are not strictly relevant to this case. For this reason, the affidavit is not attached as an appendix to this brief. The figures which are mentioned in the text appear on pages 3 and 4 of Mr. Pino's affidavit.

the Jurisdictional Statement, the fiscal effect on the State of California will be duplicated across the country since most other states have unemployment insurance programs similar to California's.

Dated: October 16, 1970.

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(Appendix A Follows)

Appendix A

Filed October 12, 1970.

In the United States District Court for the Northern District of California

CASE NO. C-70 1128 ACW

Ellenmae Crow, et al.,
Plaintiffs,

vs.

California Department of Human Resources, et al.,
Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case follows in the wake of *Java, et al. v. California Department, etc., et al.*, No. C-69 350 (N.D. Calif., April 11, 1970). Java held that *Goldberg v. Kelly*, 397 U.S. 254 (1970), which mandates a due process "fair hearing" prior to termination of welfare benefits, applies equally well to the unemployment compensation field, and that the ends of the Social Security Act, as well as of the Constitution, are best served when persons who have once been found eligible for benefits continue to receive such benefits during the pendency of appeal actions initiated by former employers.

The instant case does not involve an employer's appeal of an initial determination of eligibility. Rather, the Court must pass upon a termination of benefits, without prior hearing, following a finding that the recipient has "without good cause, refused to accept suitable employment when offered to him". Calif. Unempl. Ins. Cde. § 1257(b). Such a determination renders the recipient "ineligible to receive

unemployment compensation benefits for not less than two nor more than ten consecutive weeks beginning with the week in which the cause of . . . disqualification occurs." Calif. Unempl. Ins. Cde. § 1260(b). The plaintiff in the instant case, found to have "precluded an offer of suitable work", was declared ineligible for the full ten week period specified by § 1260(b).

Though a determination that a recipient has "refused to accept suitable employment" would, in most instances, seem pre-eminently factual, it is made without the recipient being given advance notice that the issue has been raised, or the right to confront and cross-examine those persons whose testimony may prove decisive. It is this failure to provide what are alleged to be the requisites of a "due process 'fair hearing' " that is said to run counter to *Goldberg* and *Java, cit. supra.*[1]

Certain procedural questions must be resolved before the Court reaches the merits herein. First, it is said that the case is moot, in that the named plaintiff, Mrs. Crow, has had benefits reinstated. The Court finds that while the incident which gave rise to the controversy herein has been resolved, the underlying problem remains. The Department continues to interpret the cited sections so as to stop pay-

1. None of the parties herein moved for a three-judge Court, and the Court did not ask for one on its own motion. It was felt that the issues raised herein had been thoroughly aired, and resolved, by *Goldberg v. Kelly,* and *Java v. Calif. Dep't of Human Resources, cit. supra. Turner v. City of Memphis,* 369 U.S. 350 (1962). Likewise the prayer herein was not to enjoin, on grounds of unconstitutionality, the execution of §§ 1257(b) and 1260(b), but was rather to enjoin the interpretation of these statutes in a manner inconsistent with *Goldberg* and *Java. Benoit v. Gardner,* 351 F.2d 846 (1965). This Court is aware that had it become apparent that the instant case presented issues in any significant way different from those discussed in previous cases, or if claims for relief had been broadened, a three-judge court might well have been necessary under 28 U.S.C. § 2281.

ments to recipients who have no right to a pre-termination fair hearing. This allegedly arbitrary procedure continues to threaten members of plaintiff's class. See *Kelly v. Wyman*, 294 F.Supp. 893, 908 (1968); *Singleton v. Board, etc.*, 356 F.2d 771 (1966).

Related to the asserted mootness of the controversy is the motion of one Eldon Lee Allison to intervene as named plaintiff. The motion will be denied. As noted above, the need of another named plaintiff to keep alive Mrs. Crow's case is at best arguable, and in addition, Allison's affidavit indicates additional issues which would unduly complicate those presented in Mrs. Crow's complaint.

Finally, the State and federal defendants contest the propriety of this suit as a class action under Rule 23. The Court notes that a great many of the recent cases presenting issues similar to this one have been class actions, as would seem appropriate: under challenge are state-wide procedures uniformly applicable to large numbers of persons no one of who has such a financial stake as would justify the prosecution of an individual action. *Kelly v. Wyman, cit. supra* at 908; *Wheeler v. Montgomery*, 296 F.Supp. 138 (1968), rev'd on other grounds 397 U.S. 280 (1970); *Johnson v. Robinson*, 296 F.Supp. 1165 (1967). See also 28 U.S.C.A. Rule 23, *Notes of Advisory Committee on Rules* [note to Rule 23(b)(1)(A)]. In light of these precedents, the Court finds this a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

The Court thus moves to the merits. After hearing extensive oral argument, receiving exhaustive legal memoranda, and having taken under submission cross motions for summary judgment, it is this Court's decision that the arguments presented by the defendants were, without exception, made to and rejected by the judges in *Goldberg* and *Java, cit.*

supra, and that plaintiffs are accordingly entitled to summary judgment.

The arguments against relief, considered in reverse order of importance, are the following: (1) unemployment insurance programs, and the practices here challenged, are nationwide, and the Court should avoid tinkering with questions of such broad import; (2) the public purse will be unduly threatened if the procedure urged by plaintiff is adopted; (3) the *Goldberg* rationale should be confined to welfare and has no application to unemployment compensation programs; (4) even if applicable to unemployment compensation, the *Goldberg* reasoning should not be applied to the case of Mrs. Crow.

(1) Unemployment insurance, like public assistance, is administered by the individual States within a federal statutory framework. Both programs involve grants made to the States which have established programs of aid to unemployed and/or needy persons, which programs have been certified by relevant officials as meeting the standards set by federal statutes and regulations. A challenge to any part of this national program will have repercussions elsewhere, but it would belabor the obvious to cite the decisions which have been rendered in these areas by Courts undeterred by fears that any lead provided by them might be followed in other jurisdictions. To be further noted is that any decision with regard to California's procedures will *not* be automatically applicable to other States. The demands of procedural due process must always be interpreted in light of particular systems and situations; a decision as to one such system will not be automatically applied elsewhere in the same way as were decisions based on substantive due process, e.g., *Sherbert v. Verner,* 374 U.S. 398 (1963); and *Shapiro v. Thompson,* 394 U.S. 618 (1969).

(2) The public purse has been repeatedly invoked in cases prior to this one. This Court will only echo its predecessors: fiscal considerations are always relevant, but are seldom if ever decisive in cases of this sort. "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance." *Kelly v. Wyman, cit. supra* at 901, cited with approval by *Goldberg v. Kelly, cit. supra* at 261. There are ways by which the State can protect itself, even in the welfare situation where recipients are often judgment proof, from undue dissipation of its funds. Hearings may be accelerated, and additional personnel employed. Furthermore, there are recoupment measures available which have been found constitutional. *Goldberg v. Kelly, cit. supra* at 266; *Snell v. Wyman,* 281 F.Supp. 853 (1968), aff'd 393 U.S. 323 (1969). Most pertinent in this context are Calif. Unempl. Ins. Cde. §§ 1375-80 (liability for overpayments) and the penalty provisions of § 1260(b) itself, which mean that if, after a fair hearing, an individual is found to have refused suitable employment in a given week, he may forfeit his right to payments not only for that week but for as many as nine succeeding weeks. It is difficult to see how, with the latter provision, the State would be out of pocket even if cut-off under § 1257(b) is delayed somewhat to allow confrontation and cross-examination.

(3) The government's contention that the due process considerations held decisive in *Goldberg* should be confined to welfare situations has been disposed of by *Java, cit. supra.* The State argued in *Java,* as the federal government argues here, that the controlling factor in *Goldberg* was the "brutal need" which characterizes the case of the typical welfare recipient.

Reference is made to plaintiff Crow's financial situation, to the fact that she is married to an employed individual, and to the family's ownership of two (very used) automobiles. Defendants conclude with the argument that since Mrs. Crow does not lack "the very means to live" she is not entitled to "the extraordinary remedy of a predetermination hearing. . . ."

Defendants misread *Java, Goldberg,* relevant California statutes, and the recent history of American jurisprudence. The right to confront and cross-examine adverse witnesses, where an important decision hinges on a question of fact, is *not* an "extraordinary remedy". It has been found by the Supreme Court to be constitutionally mandated "in almost every setting". *Goldberg v. Kelly, cit. supra* at 269. It is *welfare,* not unemployment compensation, or government employment, or garnishment proceedings, which was for the longest time deemed outside the protections of the due process clause. The Supreme Court invoked the "brutal need" of the welfare client, not to give him special rights not enjoyed by others, but as part of the balancing process which had been employed in previous due process cases, e.g. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 341-42 (1969) ("prejudgment garnishment may . . . drive a wage-earning family to the wall"), and *Greene v. McElroy,* 360 U.S. 474, 508 (1959) ("petitioner's work opportunities have been severely limited . . ."). It would be anomalous indeed if the Supreme Court's extension of procedural guarantees to welfare eligibility determinations was used to justify a restriction of similar rights previously recognized in other areas.

(4) The Court now moves, perhaps cumbrously, to the *ad hoc* balancing process utilized in recent cases of this sort.

"[One's] constitutional right to procedural due process entitles him to a quality of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 *Harv. L. Rev.* 1439, 1452 (1968). While engaging in this comparison of interests, we repeat that it is clear that a pre-determination hearing, with the right to confront and question witnesses *is the constitutional norm, and not the exception,* as defendants would imply, *when "government action seriously injures an individual",* and where the crucial decision is based upon facts alleged by a third party. *Greene v. McElroy, cit. supra* at 496.

It cannot be doubted that plaintiff herein has shown "serious injury" from the government procedures complained of. She is a member of a class for which both courts and legislature have found unemployment compensation a necessary last-ditch safeguard against being thrust upon public charity. See *Java v. California Dep't, etc., cit. supra* at .....; *Calif. Portland Cement Co. v. Calif. Unempl. Ins. Appeals Bd.,* 178 C.A.2d 263 (1960); Calif. Unempl. Ins. Cde. §§ 100-01. She was found initially eligible for benefits, had begun receiving said benefits, but was cut-off from them upon receipt by the Department of third party information which, in the Department's opinion, justified a finding that she had refused suitable employment. The injury to her was compounded when the Department informed her that she would be subject to the maximum "penalty period" imposed by § 1260(b).

The fact that Mrs. Crow was vindicated on appeal and won refund of wrongly withheld benefits does not affect the gravity of the harm caused her. On the contrary, the Court notes that the median six week period required before

witnesses are cross-examined on appeal, and the thirty-two per cent of appellants who wait during that time and then are found worthy of relief, together make this case indistinguishably close to *Goldberg*.[2]

The defendants have attempted to differentiate Mrs. Crow's case from others cited above on the ground that while the plaintiffs in *Java, Sniadach,* etc. could point to takings of property or entitlements clearly theirs, Mrs. Crow was never really eligible for benefits for the week here concerned. Under California's system, eligibility is dependent not only on an initial finding of qualification such as was involved in *Java,* but on independent, weekly findings of continued "availability" for employment. Calif. Unempl. Ins. Cde. §§ 1253(c) 1257 (b).

This theory is redolent of older vested rights concepts which still enjoy considerable life in the law of due process. If a person can point to personal possessions, or wages, or a position of public employment, that are clearly his, he is in a better position to argue procedural rights if an attempt is made to take that "property" without a prior hearing. *Sniadach v. Family Finance, etc., cit. supra; Slochower v. Bd. of Educ., etc.,* 350 U.S. 551 (1956); *Klim v. Jones,* No. 52332 (N.D. Calif. July 17, 1970). But however useful they may be in some cases, these concepts become burdensome in others. Welfare and unemployment compensation schemes

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2. "[We note] the startling statistic that post termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases . . . . in the fair hearings on discontinuance which reached decision from April through August of this year, only 50 of 78 cases, or 64%, were affirmed." *Kelly v. Wyman, cit. supra* at 901 (text and accompanying note).

"Thus the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Goldberg v. Kelly, cit. supra* at 266.

both involve an initial decision *re* general eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision. It is most difficult to say at any point in the proceeding whether the recipient's right to further payments is "vested" or not, and the Court in *Goldberg* made no such distinction.[3]

The key, then, to recent cases is not whether the entitlement is vested but whether it is contested. When an individual is deprived of a statutory benefit which he has previously enjoyed due to an adverse finding where factual issues are in dispute, and where the agency concerned has acted upon third party information, the ancient and "relatively immutable" jurisprudence of *Greene, Sniadach,* and *Goldberg* comes into play. It is in a case such as Mrs. Crow's, where the claimant said she was offered no job, and where the interviewer disagreed, saying he had learned she refused employment, that confrontation and cross-examination are

3. It might be appropriate to compare the case histories of the plaintiffs in *Kelly v. Wyman, cit. supra,* with that of plaintiff herein. In *Kelly,* Mrs. Angela Velez, a welfare recipient, was terminated after the landlady reported nocturnal visits to the Velez home by Mrs. Velez' husband. The post-termination hearing found the information to have been false, and benefits wrongfully terminated. Another plaintiff was terminated following an agency finding, without a "fair hearing", that she had been working for the local Board of Education while receiving benefits. Plaintiff herein, Mrs. Ellenmae Crow, was receiving benefits, but was terminated when her Department interviewer told her he had spoken with a Mr. Spray, of Goodwill Industries, who had told him that Mrs. Crow had turned down a job offer. Mrs. Crow vigorously contested that an offer had been made, but nonetheless had to await appeal procedures before being able to present the results of her own direct questioning of Mr. Spray.

It seems clear that in all three cases, recipients previously found eligible, who had begun to receive benefits, were terminated without prior "fair hearings" on the basis of contested, third party information regarding conduct subsequent to the initial determination of eligibility.

necessary.[4] This adverse finding, based on second-hand information which was ultimately proven inaccurate, deprived Mrs. Crow not only of payments for the particular week, but for nine weeks beyond that. Especially in light of this § 1260(b) "penalty", impact of the finding cannot be confined to that week in which it was rendered; its real effect, was to reverse, without a fair hearing, the initial determination of eligibility. *Goldberg* and *Java* are clearly in point, and will be applied by this Court.

Accordingly, IT IS HEREBY ORDERED that the State defendants herein, their successors in office, agents and employees, are permanently enjoined from enforcing Calif. Unempl. Ins. Cde. §§ 1257(b) and 1260(b) in such a way as to result in termination, prior to a hearing consonant with the principles of *Goldberg v. Kelly, cit. supra,* of unemployment compensation benefits due persons who have timely contested factual allegations brought under the aforementioned statutes.

Execution of this Order will be stayed ten (10) days from the date of its filing. Any further stay will be granted only upon a proper motion and showing by defendants.

Dated: October 12, 1970.

ALBERT C. WOLLENBERG
United States District Judge

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4. The Court must emphasize what it is *not* deciding in the instant case. It is *not* deciding what procedures are necessary when the only dispute is as to the application of statutes or regulations to uncontested facts. See *Goldberg* at 268, footnote 15. Nor is it treating of factual problems "of general or common application" to an entire class of recipients, e.g., the trade dispute situation dealt with by Calif. Unempl. Ins. Cde. § 1262.5. Finally, the Court expresses no opinion of procedures where relevant facts are ascertainable by reference to "objectively determinable" data, e.g. medical reports, and where ample time and resources are available to all parties for gathering such data. See *Messer v. Finch,* No. 1814 (E.D. Ken., June 5, 1970). See also *Kelly v. Wyman, cit. supra* at 905.

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IN THE

Supreme Court of the United States

October Term 1970
No. 507

JUDITH JAVA and CARROLL H. HUDSON, *et al.*,
Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT; GILBERT SHEFFIELD, Individually and as Director of the California Department of Human Resources Development,
Appellants.

On Appeal from the United States District Court for the Northern District of California.

MOTION OF SOUTHERN CALIFORNIA EDISON COMPANY, ET AL., TO INTERVENE AS DEFENDANTS-APPELLANTS.

I.

Motion and Preliminary Statement.

Applicants for Intervention, Southern California Edison Company, California Metal Enameling Company, Transit Mixed Concrete Company, American Cement Corporation, West Coast Chain Manufacturing Company, and Occidental Life Insurance Company (hereinafter "Applicants") move for leave to intervene as

defendants in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure and Rule 35 of the Supreme Court Rules. The Applicants move to intervene in order to assert the defenses set forth in their proposed amendment which accompanies this motion,[1] and in order that the Applicants may participate as formal parties in the appeal and subsequent proceedings in this cause. The present parties have indicated that the Applicants' request for consent to file an *amicus curiae* brief on the merits will be granted. However, the Applicants maintain that their interest in this cause is of such significance that the status of *amici curiae* would be inadequate to protect their interest; an *amicus curiae* brief will be filed only as an alternative to being filed on behalf of the Applicants as formal parties.

The following brief submitted in support of the motion to intervene will more fully develop and demonstrate the Applicants' substantial interest in this litigation. In summary, that argument will show that the Applicants are employers within the State of California, and as such, are subject to the taxing provisions of the California Unemployment Insurance Code. The unemployment insurance taxes paid by employers constitute almost the sole source of income collected in the Unemployment Fund, from which unemployment benefits are disbursed to qualified claimants. Employers have a substantial interest in seeing that excessive amounts are not disbursed from the Fund, for as bene-

[1]See Exhibit A.

fits increase, the employers' unemployment taxes also increase. Section 1328 of the Code provides employers with a procedure for testing the propriety of disbursements by granting an employer the right to challenge the Department's initial determination to pay benefits to a former employee whom the employer believes is ineligible. Section 1335 provides in part that if such an appeal is filed by the employer, the payment of benefits will be suspended. The District Court has enjoined the enforcement of that Section holding that the lack of a pre-termination hearing renders the Section constitutionally defective.

A decision upholding the District Court's invalidation of Section 1335 could have a substantial financial effect upon employers within the state. Affidavits submitted by representatives of the Applicants, attached hereto as Exhibits B through G, demonstrate the significant increase in taxes which the employers could be required to pay. In summary, the affidavits show that should disbursements from the Fund significantly increase, a result which necessarily follows from the District Court's decision, employers could be required to pay taxes based upon a higher taxable wage base and under a higher tax schedule. If both of these bases for computing the Applicants' tax rates had been operative in 1969, the Applicants' unemployment taxes would have shown an increase over taxes actually paid in 1969 in these amounts: Southern California Edison Co.—93.3%; California Metal Enameling Co.—31.3%; Transit Mixed Concrete Co.—53.2%; Ameri-

can Cement Corp.—62.1%; West Coast Chain Manufacturing Co.—66.8%; Occidental Life Insurance Co. —35.2%.

This direct financial impact, and the nature and structure of the unemployment insurance program, serve to illustrate that employers within the state, rather than the state itself, are the real parties in interest in this litigation. In essence, the state merely serves as an adminstrator of private funds, disbursing sums from an account completely segregated from ordinary tax revenue. Employers are as entitled as the appellees to procedural due process under the Fourteenth Amendment with regard to the proper administration of the Fund. A ruling favorable to the appellees would substantially affect the employers' rights, but would infringe upon the state's interests only to the extent that new procedures might render the administration of the Fund more cumbersome.

The Applicants, therefore, have a substantial interest in the instant litigation, and are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest. The Applicants have a defense to the appellees' claims presenting both questions of law and of fact which are common to the main action. Moreover, the interests of the Applicants and the appellants diverge to the extent that the Applicants' interest may not be adequately represented by existing parties. The Applicants will show that intervention at this stage of the proceedings is proper, that the motion is timely, and that their interest in this cause is such that they should be granted leave to intervene of right pursuant to Fed. R. Civ. P. 24(a), or in the alternative, granted permission to intervene pursuant to Fed. R. Civ. P. 24(b).

II.

Applicants Should Be Granted Leave to Intervene of Right.

Rule 24(a) of the Federal Rules of Civil Procedure states:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (a) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The applicable subsection in this instance is 24(a)(2). The Applicants meet all the prerequisites to intervention established by that subsection.

A. The Motion Is Timely and Is Properly Addressed to the Appellate Court.

The Applicants must address their motion to intervene to this Court becuase it is the only court to which application for intervention may now be made. Since an appeal has been taken, the District Court is without jurisdiction to entertain the motion. *United States v. Radice* (2d Cir. 1930), 40 F. 2d 445; *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.* (S.D.N.Y. 1942), 3 F.R.D. 162; see generally 3B Moore's Federal Practice ¶24.13[1] at 24-528. Although a motion to intervene at the appellate level is uncommon, this Court has recognized the propriety of such a motion under certain circumstances. In *Auto*

Workers v. Scofield (1965), 382 U.S. 205, the Court held that a successful charging party in an NLRB proceeding has the right to intervene in appellate proceedings. In reaching that conclusion, the Court noted that although the National Labor Relations Act did not provide explicitly for intervention at the appellate court level, the Federal Rules of Civil Procedure provided a helpful analogy supporting intervention. The Court noted that:

> "The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts. * * *"
>
> *Auto Workers v. Scofield,* 382 U.S. 205, 217 (Fn. 10).

Other courts have recognized the propriety of a motion to intervene on appeal when, under the circumstances of the case, the Applicants' interest could not be otherwise adequately protected. In *Smuck v. Hobson* (D.C. Cir. 1969), 408 F. 2d 175, the Court held that parents of school children were properly granted leave to intervene after judgment in order to register their dissent from the district court's decision. The Court noted that:

> "The relevance of substantial and unsettled questions of law has been recognized in allowing intervention to perfect an appeal. And this Court has noted repeatedly, 'obviously tailored to fit ordinary civil litigation, [the provisions of Rule 24] require other than literal application in atypical cases. * * *"
>
> *Smuck v. Hobson,* 408 F. 2d 175, 180.
>
> *Cf., Wolpe v. Poretsky* (D.C. Cir. 1944), 144 F. 2d 505, *cert. denied* (1944), 323 U.S. 777.

Application to this Court is timely under the circumstances of this case. First, counsel for the Applicants was not authorized to proceed with a motion to intervene in the District Court until May 5, 1970. Upon receiving that authorization, research was undertaken in order to discern the financial impact which a decision favorable to the plaintiffs would have on each individual employer. As the attached affidavit of counsel for the Applicants more fully explains,[2] this research was still underway when the District Court's order granting the preliminary injunction was filed on May 14, 1970, and when notice of appeal was filed thereafter. Counsel was therefore unable to prepare and file the necessary motion papers in the District Court; since that Court cannot now entertain the motion, the Applicants' only recourse is to seek to intervene before this Court.

The Applicants' motion to this Court is proper and timely, secondly, because the District Court had an opportunity to pass upon the propriety of joining the employers but refused to do so. The appellants filed a motion to dismiss in the Court below for failure of the appellees to join indispensable parties pursuant to Fed. R. Civ. P. 19(a). In an analogous case, the same District Court granted a motion to dismiss for failure to join employers, with leave to amend. *Romero v. Wirtz* (N.D. Cal. 1969), Civil No. 50213.[3] But in the instant case, the Court entered its order granting the preliminary injunction without ruling upon the appellants' motion to dismiss. Since the issue was before the

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[2]The affidavit of Willard Z. Carr, Jr. is attached hereto as Exhibit H.

[3]A copy of the order granting the defendants' motion to dismiss in *Romero* is attached hereto as Exhibit I.

Court prior to the entry of the decree, the instant motion is timely; no purpose could now be served by moving for the Applicants' joinder as defendants in the District Court.

B. Applicants Have an Interest Relating to the Transaction Which Is the Subject of the Action.

In the Preliminary Statement, *supra*, the possible financial impact upon the Applicants, if the District Court's decision is upheld, was briefly illustrated. This direct financial effect would be likely to occur, due to the statutory structure of the unemployment insurance program.

Three elements in the financing structure for unemployment insurance affect the amount of taxes California employers pay to support the system regardless of their individual reserve account accumulations and their experience with unemployment. One of these elements is the taxable wage base (Unemployment Insurance Code Section 930). Whenever total revenues to the Unemployment Fund equal or exceed disbursements, employers pay taxes at the assigned rates on the first $3,800 of each employee's annual earnings. When revenues fall short of disbursements, however, employers pay taxes on the first $4,100 of each employee's wages. Thus, at the average 1969 tax rate of 2.51%, a company would pay a per employee tax ranging from $95.38 to $102.91, depending on the relationship of fund income to outgo.

The second is the balancing account tax (Section 976.5 of the Code). Charges to the balancing account include benefit payments not charged to individual employer's accounts, extended duration payments, and benefits charged against deficit accounts. Credits to

the balancing account come mainly from uniform taxes levied on all employers and interest earned by the unemployment funds. The tax rate depends upon the relationship between charges to the account and its credits and ranges from a high of 1.0% to a low of 0.2%. An employer who was not responsible for any charges against the balancing account could be assessed for per employee charges of as much as $41 or as little as $7.60, depending upon the relationship of account charges to credits.

The third element concerns the two experience rating tax schedules (Sections 977 and 978 of the Code). Under these variable schedules, employers are taxed in relation to their experience with unemployment; however, the factor governing the operative schedule is the relationship of the Unemployment Fund to total taxable wages in the state. The high tax schedule is designed to produce more revenue than the low, so employers with excellent experience pay more taxes whenever the high tax schedule is in effect. For example, an employer with the optimum reserve account ratio would pay at the rate of 0.8% when the high schedule is in effect; under the low schedule, he would be assigned a zero rate.

Under this statutory structure, a decision upholding the District Court's invalidation of Section 1335 could subject each of the Applicants to a substantial increase in unemployment taxes. The interest of the Applicants differs from the interest of a member of the general public, for the Applicants are part of a limited taxpaying group whose taxes are earmarked for a specific fund and whose taxes will increase by a measurable amount if particular contingencies provided for by statute occur. In contrast to the general public whose

main interest is the broad one of conserving public funds, the Applicants have the discernible and tangible financial interest of not having a higher tax schedule already provided by statute applied to them. The Applicants' financial interest in the Unemployment Fund is not unlike the interest of the State of California in *Cascade Natural Gas Co. v. El Paso Natural Gas Co.* (1967), 386 U.S. 129, 135, described by the Court as being "at the heart" of the controversy; and, thus, qualifying the State as an intervenor. In *Cascade*, the Court held that the protection of the State's interest in a competitive system, Cascade's interest as a competitor, and Southern California Edison's interest as a customer, were all sufficient "interests" under Rule 24 to justify intervention. The Applicants' interest in the instant litigation is similarly significant; the Applicants should have an opportunity to be heard and protect that interest as formal parties.

C. The Applicants Are so Situated That the Disposition of the Action May as a Practical Matter Impair or Impede Their Ability to Protect That Interest.

Prior to the 1966 amendment to Rule 24(a), it was required that an applicant's interest might be "bound" in the *res judicata* sense before it could obtain intervention as of right. See 3B *Moore's Federal Practice* ¶24.09-1[3] (1960). The 1966 amendment eliminated this condition and substituted the concept of impairing or impeding an applicant's ability to protect its interest as "a practical matter." In *Cascade Natural Gas Co. v. El Paso Natural Gas Co., supra,* the Court noted that the

amendments were intended to inject elasticity into the former practice, as evidenced by the Advisory Committee's quotation of Professor Moore's observation:

> ". . . Rule 24(a)(3) was unduly restricted. * * * Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. * * * "
>
> *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 134 (Fn. 3).

This correlation between Rule 19(a)(2)(i) and Rule 24(a)(2), as well as Rule 23 governing class actions, was extensively analyzed in *Atlantis Development Corp. v. United States* (5th Cir. 1967), 379 F. 2d 818. In *Atlantis* the Court noted that:

> "In these three Rules the Advisory Committee, unsatisfied with the former Rules which too frequently defined application in terms of rigid legal concepts such as joint, common ownership, res judicata, or the like, as well as court efforts in applying them, deliberately set out on a more pragmatic course. For the purposes of our problem, this course is reflected in the almost, if not quite, uniform language concerning a party who claims an interest relating to the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . .

> "Although this is question-begging and is therefore not a real test, this approach shows that the question of whether an intervention as a matter of right exists often turns on the unstated question of whether joinder of the intervenor was called for under new Rule 19. * * *"
>
> *Atlantis Development Corporation v. United States,* 379 F. 2d 818, 824-825.

The Court held that intervention of right was improperly denied by the trial court. In so holding, the Court observed that:

> "Foremost, of course, is the plain proposition that the judgment itself as between Government and defendants cannot have any direct, immediate effect upon the rights of Atlantis, not a party to it.
>
> "But in a very real and practical sense is not the trial of this lawsuit the trial of Atlantis' suit as well? * * *"
>
> *Atlantis Development Corporation v. United States,* 379 F. 2d 818, 826.

The same question could be posed with regard to the practical effect that the disposition of the instant case would have upon the Applicants. Although a decision favorable to the appellees would not hold the Applicants directly liable under the judgment, a similar result in the form of higher unemployment taxes would necessarily follow. The Applicants would be effectively foreclosed from challenging increased disbursements from the Fund in a subsequent lawsuit. In this sense, then, the Applicants should have been joined as defendants in the Court below pursuant to Rule 19(a) (2)(i). If joinder was required, intervention of right under Rule 24(a)(2) would also be proper.

D. The Applicants' Interest May Not Be Adequately Represented by the Existing Parties.

In addition to the requirement that an applicant for intervention show that its interest might be bound by a judgment in the action, Rule 24(a) prior to the 1966 amendment also required that the applicant show that the respresentation of its interests by existing parties "is or may be inadequate." ***Kozak v. Wells,*** (8th Cir. 1960), 278 F. 2d 104; ***Farmland Irr. Co. v. Dopplmaier,*** (9th Cir. 1955), 220 F. 2d 247; ***Hamilton v. Civillico*** (E.D. Pa. 1963), 34 F.R.D. 1. The 1966 revision, providing for intervention "unless the applicant's interest is adequately represented by existing parties," has been interpreted as being designed to place a burden of showing adequacy of representation on one opposing intervention of right. *Nuesse v. Camp,* (D.C.Cir. 1967), 385 F. 2d 694.

> "The Commissioner's right to intervene as a party depends also on whether his interest is adequately represented by existing parties * * *. The prior text of Rule 24 spoke in terms of whether representation by existing parties 'is or may be inadequate.' The present rule provides for intervention 'unless the applicant's interest is adequately represented by existing parties.'
>
> "While the change in wording does not relate to any change in standard as such, it underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention."
>
> *Nuesse v. Camp,* 385 F. 2d 694, 702.

Accord:

Smuck v. Hobson (D.C. Cir. 1969), 408 F. 2d 125.

Although other courts and writers have concluded that the amendment was not intended to place a burden of proving the adequacy of representation on the opposing party, *see, e.g., Edmonson v. Nebraska* (8th Cir. 1967), 383 F. 2d 123; 2 *Barron & Holtzoff*, Federal Practice and Procedure § 597 (Supp. 1969); 3B *Moore's Federal Practice* ¶24.09-1[4] (1969), it is undisputed that the test is still whether the interest of the intervenors "may be" inadequately represented.

It is clear, of course, that "inadequate representation" does not mean there may be a lack of legal ability on the part of the Attorney General's office, nor that the state is unmindful of the employers' position. The possibility of inadequate representation lies in the divergence of interests between the state and the Applicants for intervention.

A divergence of interests has been held sufficient to support a finding that representation may be inadequate. In *Nuesse v. Camp* (D.C. Cir. 1967), 385 F. 2d 694, the Court stated:

> "However, interests need not be wholly adverse before there is a basis for concluding that existing representation of a 'different' interest may be inadequate."
>
> *Nuesse v. Camp*, 385 F. 2d 694, 703.

The Court went on to analyze the interests of each party and noted that the interest of the state official seeking intervention was of a different order than that of the party bringing the suit, a state bank which

came under the jurisdiction of the intervening official. The Court dismissed the connection that the similarity of the present legal contentions of the parties meant adequacy of representation and held that since the interests of the plaintiff and the application for intervention "may not coincide", the requirement that there may be inadequate representation had been met.

In *Ford Motor Co. v. Bizanz Bros. Inc.* (8th Cir. 1957), 249 F. 2d 22, a sufficient divergence of interests was found to justify intervention of right. In that case, Ford sought to intervene in a class action brought by property owners to enjoin the operation of a railroad in a residential section of a city. The suit would have deprived Ford of essential railroad services. Although Ford adopted the denials and allegations of the railroad's answer, the Court believed that the two parties had different interests and concluded that since it could not be said with certainty that Ford's interest would be adequately represented, intervention was necessary. Similarly, in the instant case it cannot be said with certainty that the Applicants' interests will be adequtely represented.

There is a paucity of authority with regard to the extent to which the interests of an applicant and an existing party must diverge before inadequacy of representation may be found. It is clear in this case, however, that such a divergence exists. This is because in this type of action, the State is merely put to the task of defending the propriety of an existing statutory provision. Since the legislature has decreed that benefits shall not be due until the employer's appeal is heard, the office of the Attorney General must defend that mandate. From a practical standpoint, however, an adverse ruling would affect only one segment of the State

population—employers. Such a ruling would deny employers an opportunity to be heard before benefits are paid; employers would therefore be subject to significantly increased unemployment contributions without a prior fair adjudication of the claimant's eligibility. The Applicants' interest is preserving the present guarantee that they will be accorded due process of law before benefits are held to be due is therefore completely divergent to the State's administrative concern. Since those interests are so divergent, the Applicants' interests may not be adequately represented; intervention of right should therefore be granted.

III.

Assuming That Applicants Are Not Entitled to Intervention as of Right the Court Should Exercise Its Discretion to Grant Permissive Intervention.

Rule 24(b) of the Federal Rules of Civil Procedure states:

> "(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice and adjudication of the rights of the original parties."

Application for intervention in this case has been timely and intervention should not delay the adjudication of the rights of the original parties, as was more fully set forth in Section II, *supra*. No prejudice would result from the granting of intervention.

Under Rule 24(b) the basic test is whether or not there are common questions of law or fact. There is no requirement that an applicant also possess a protectible interest or be inadequately represented. In this instance, the questions of law and fact posed by the applicants are identical to the questions already framed in the original pleadings. Thus this is an appropriate case for the Court to grant intervention.

IV.

Conclusion.

For the reasons stated herein, Applicants' motion for leave to intervene should be granted either on the basis that they are entitled to intervention as of right under Rule 24(a) or as appropriate parties for intervention under the Court's discretionary powers pursuant to Rule 24(b).

Dated: October 30, 1970.

Respectfully submitted,

WILLARD Z. CARR, JR.,
Attorney for Applicants for Intervention Southern California Edison Company, et al.

Proof of Service.

I, WILLARD Z. CARR, JR., one of the attorneys for Southern California Edison Company, *et al.*, applicants for intervention herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 30th day of October, 1970, I served copies of the foregoing motion to intervene on the several parties thereto, as follows:

1. On the Appellee, Judith Java, *et al.*, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to James Klein, Esq., one of the attorneys for the Appellees, at the offices of the Contra Costa Legal Services Foundation, 337 Tenth Street, Richmond, California 94801.

2. On the Appellants, California Department of Human Resources Development, *et al.*, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Thomas C. Lynch, Esq., counsel for the Appellees, at his offices, 6000 State Building, San Francisco, California 94102.

WILLARD Z. CARR, JR.,
By WILLARD Z. CARR, JR.,
Attorney for Applicants for Intervention Southern California Edison Company, et al.

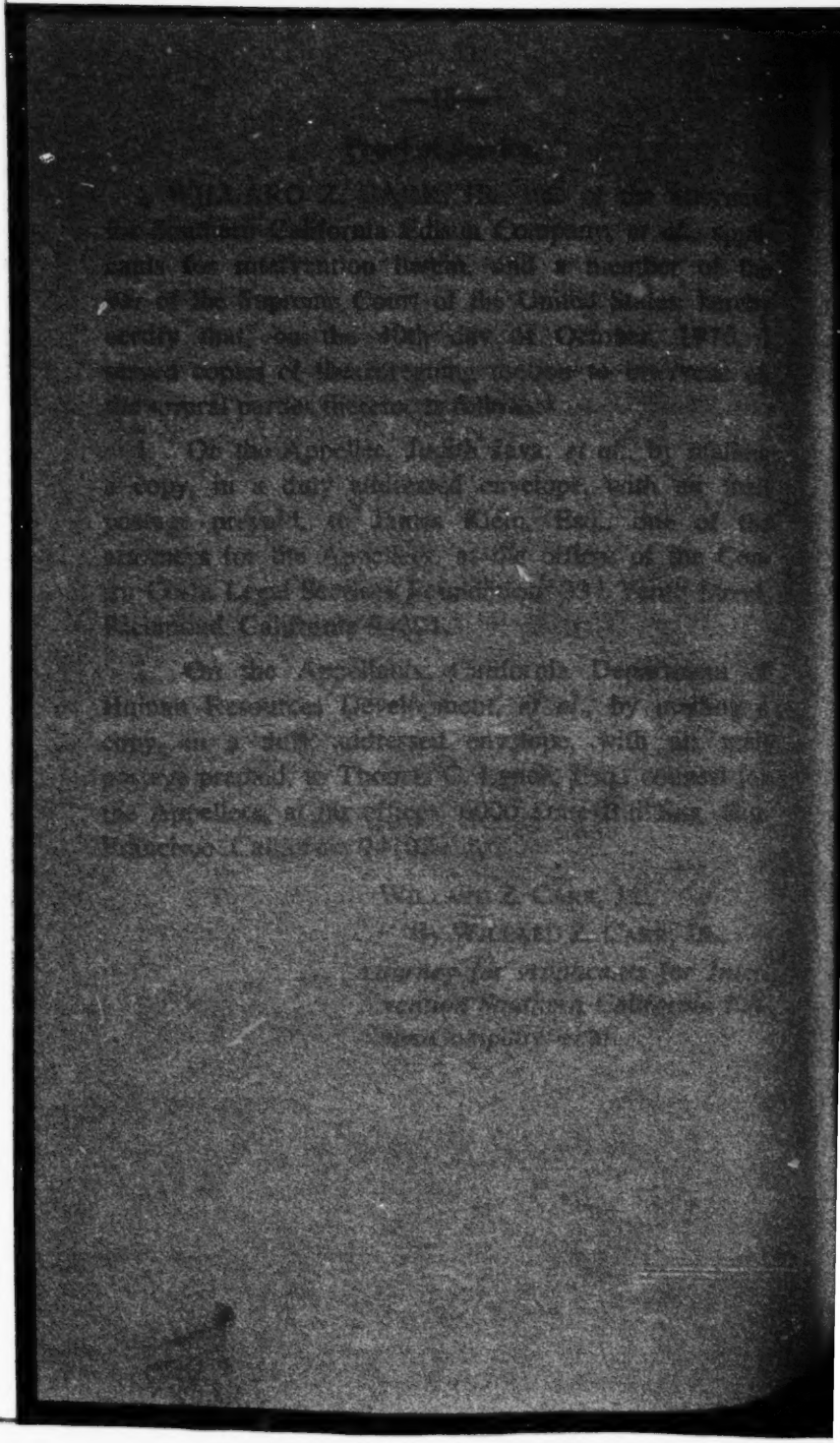

EXHIBIT A.

Answer of Intervening Defendants.

United States District Court, Northern District of California.

Judith Java and Carroll H. Hudson, individually, on behalf of themselves, and all others similarly situated, Plaintiffs, v. California Department of Human Resources Development; Gilbert Sheffield, individually and as Director of the California Department of Human Resources Development, Defendants, and Southern California Edison Company, et al., Intervening Defendants. Civil Action No. C-69 350 ACW.

Intervening defendants answer the complaint as follows:

1. Answering paragraph I, intervening defendants deny that suit is "authorized" by any statute cited therein and with this exception, admit the allegations of said paragraph.

2. Answering paragraph II, intervening defendants admit the allegations of said paragraph.

3. Answering paragraph III, intervening defendants deny that 42 U.S.C. 1983 "authorizes" this suit, and, with this exception admit the allegations of said paragraph.

4. Answering paragraph IV, intervening defendants lack information and belief as to the allegations of said paragraph, and based on such lack of information and belief, deny each and every allegation thereof.

5. Answering paragraph V, intervening defendants have no information and belief sufficient to enable them to answer the allegations of said paragraph, and based on such lack of information and belief, deny each and every allegation thereof.

6. Answering paragraph VI, intervening defendants admit the allegations of said paragraph.

7. Answering paragraph VII, intervening defendants admit the allegations of said paragraph.

8. Answering paragraph VIII, intervening defendants admit the allegations of said paragraph.

9. Answering paragraph IX, intervening defendants admit the allegations of said paragraph.

10. Answering paragraph X, intervening defendants admit the allegations of said paragraph and are informed and believe, and based upon such information and belief so allege, that defendant Director Gilbert L. Sheffield and each of his predecessor directors in office have formulated and filed with the Secretary of Labor a state plan for unemployment insurance pursuant to the provisions of the Unemployment Insurance Code and the former Unemployment Insurance Act; such plan has been certified by the Secretary of Labor to conform wih the provisions of 42 U.S.C. 501, et seq., including the provisions of Section 1335 of the Unemployment Insurance Code and its predecessor section; and that federal funds for the administration of the unemployment insurance program in the State of California have been received by the Department of Human Resources Development and its predecessor the Department of Employment, were so received during all periods involved in the proceeding before the Court, and are being so received predicated upon the approval and certification of the California state plan for unemployment insurance by the Secretary of Labor.

11. Answering paragraph XI, intervening defendants admit the allegations of said paragraph.

12. Answering paragraph XII, intervening defendants admit that on September 4, 1969, plaintiff, Ju-

dith Java, was initially determined to be eligible for unemployment insurance benefits by the Department of Human Resources Development, that a former employer filed a notice of appeal from this determination by the Department, that on September 10, 1969, the Department informed her that she would not receive unemployment benefits until a hearing had been held on the appeal, and having no information or belief sufficient to enable them to answer the remaining allegations of said paragraph, deny each and every other allegation thereof. Intervening defendants are informed and believe, and based on such information and belief so allege, that a hearing was held on this appeal on December 1, 1969 after a three week delay due to plaintiff's request for a continuance, and that on December 3, 1969 the referee ruled that plaintiff Judith Java disqualified from receiving benefits.

13. Answering paragraph XIII, intervening defendants admit that plaintiff Carroll H. Hudson was initially determined to be eligible for unemployment insurance benefits in August of 1969, that payment of benefits commenced, that her former employer appealed this determination, that on September 8, 1969 the Department informed her that no unemployment insurance benefits would be paid until a decision on the appeal has been reached, and having no information and belief sufficient to enable them to answer the remaining allegations of said paragraph, deny each and every other allegation therein. Intervening defendants are informed and believe, and based upon such information and belief so allege, that on November 12, 1969 a hearing was held on this appeal and the referee affirmed the determination of the Department that plaintiff Carroll Hudson was entitled to benefits.

14. Answering paragraph XIV, intervening defendants admit that under section 1335 of the Unemployment Insurance Code an unemployed worker initially determined to be eligible by the Department receives no benefits once an appeal is filed by his employer until after a decision is reached on the appeal, specifically deny that an appeal often takes several months to resolve, and generally and specifically deny each and every other allegation of said paragraph.

15. Answering paragraph XV, intervening defendants lack information and belief sufficient to enable them to answer the allegations of said paragraph, and based on such lack of information and belief deny generally and specifically each and every allegation thereof.

16. Answering paragraph XVI, intervening defendants lack information and belief sufficient to enable them to answer the allegations of said paragraph, and based on such lack of information and belief, deny generally and specifically each and every allegation thereof.

17. Answering paragraph XVII, intervening defendants allege that the Department and its employees have not acted arbitrarily toward plaintiffs and their class, further allege that the Department has followed all applicable laws with respect to plaintiffs and has accorded plaintiffs and their class all rights to which they are entitled under federal and state law, and deny generally and specifically each and every allegation of said paragraph.

18. Answering paragraph XVIII, intervening defendants deny generally and specifically each and every allegation of said paragraph.

FIRST DEFENSE

19. The complaint fails to state a claim against the defendant upon which relief can be granted.

WHEREFORE, intervening defendants pray,

1. That plaintiffs be granted no relief in this action;

2. That the court grant such other relief as may seem proper.

DATED: October 27, 1970.

WILLARD Z. CARR, JR.
By /s/ Willard Z. Carr, Jr.
Willard Z. Carr, Jr.
of GIBSON, DUNN & CRUTCHER
Attorneys for Intervening
Defendants.

EXHIBIT B.

State of California, County of Los Angeles—ss.

C. H. FAULKNER, being first duly sworn, deposes and says:

1. I am the Manager of Industrial Relations of Southern California Edison Company (hereinafter the "Company"), and I held that position during all the times mentioned herein. I make this affidavit on the basis of my best knowledge and belief, and in support of the application of the Company for leave to intervene as a party defendant.

2. The Company is a California corporation engaged as a public utility in the supply of electricity in the central and southern portions of the State of California. Based on annual revenues, the Company is the fifth largest electric utility in the nation. As an employer within the State of California, the Company pays unemployment insurance contributions as required by the California Unemployment Insurance Code (hereinafter the "Code"). Pursuant to Section 1335 of the Code, the Company may appeal an initial determination of eligibility for unemployment insurance benefits, under which payments of benefits to a claimant are suspended pending the outcome of the appeal.

3. The Company maintained an average work force of 11,500 employees during 1969; the number of Company employees as of December 31, 1969, totalled 11,902. Taxable wages earned by Company employees during the 1969 calendar year totaled $46,544,017. Based on those wages, the Company paid $465,440 in taxes into the State of California Unemployment Fund (hereinafter the "Fund"). That amount reflects the Company's tax rate of 1.0% of employees'

wages in 1969, including the 1.0% balancing account tax rate.

4. In calendar year 1969, Company employees filed 371 claims for unemployment insurance benefits. In 187 instances the Company protested these claims to the Department of Human Resources Development, and on 174 occasions the determination by the Department was favorable to the contentions of the Company. On one occasion during 1969 the Company appealed from a determination of the Department to a Referee of the Unemployment Appeals Board. Although the appeal was decided unfavorably to the Company, I believe these figures support the Company's position that employer protests and appeals are taken in good faith, and are not designed to withhold benefits from deserving employees.

5. The possible impact upon the Company, if the decision of the District Court invalidating Section 1335 of the Code is upheld, could be substantial:

(a) If the disbursements from the Fund exceeded the total revenues in a twelve-month period and the Company is accordingly required to pay taxes upon the first $4,100 of wages rather than the first $3,800 of wages under Section 930 of the Code, the amount of additional taxes payable on wages earned in a year like 1969 would be $34,433, or 7.4%;

(b) Increased disbursements from the Fund could also place the Company under the higher tax schedule in Section 977, rather than the low schedule in 978. If the Company were required to pay under the high tax schedule, which would occur if the year-end balance in the Fund amounts to less than 5% of the wages in employment, in a year like 1969 the Company would

be required to pay at the increased rate of 1.8%, including the 1.0% balancing account tax rate. Based on 1969 payrolls, payments at this rate would have increased the Company's taxes by $372,352 or 80.0%. If the high taxable wage base and the high tax schedule had been operative in 1969, total unemployment taxes, including the 1.0% balancing account tax, would have totaled $899,781, an increase of 93.3% over the $465,440 in taxes paid on calendar 1969 wages.

6. The Company believes the foregoing figures demonstrate that it has a significant economic interest in the pending litigation. The disposition of the action, in the absence of the Company's joinder as a party defendant, would leave the Company's interest unprotected; that interest differs from that of the State of California and its agents to the extent that the Company's interest may not be adequately represented by those parties.

C. H. Faulkner

Subscribed and sworn to before me, this 7th day of August, 1970.

Dorothy V. Roth,

Notary Public in and for said State and County.

EXHIBIT C.

State of California, County of Los Angeles—ss:

STANDISH K. PENTON, being first duly sworn, deposes and says:

1. I am the Secretary-Treasurer of California Metal Enameling Company (hereinafter the "Company"), and I was the Secretary-Treasurer thereof during the times mentioned herein. I make this affidavit on the basis of my best knowledge and belief, and in support of the application of the Company for leave to intervene as a party defendant.

2. The Company, a California corporation, is, and has been since 1911, a manufacturer of porcelain enameled metal products. As an employer within the State of California, the Company pays unemployment insurance contributions as required by the California Unemployment Insurance Code (hereinafter the "Code"). Pursuant to Section 1335 of the Code, the Company may appeal an initial determination of eligibility for unemployment insurance benefits, under which payments of benefits to a claimant are suspended pending the outcome of the appeal.

3. The Company employed an average of 202 employees within the State of California in the calendar year 1969, and based on taxable wages totaling $853,501 during that period, paid $18,777 into the State of California Unemployment Fund (hereinafter the "Fund"). That amount reflects the Company's tax rate of 2.2% of employees' wages in 1969, including the 1.0% balancing account tax rate.

4. In calendar year 1969, 37 claims for unemployment compensation were filed by Company em-

ployees. The Company protested 17 of these claims to the Department of Human Resources Development. Although the Department upheld the Company's position in only 2 of the 17 instances, no appeals to a Referee of the Unemployment Insurance Appeals Board were filed by the Company. I believe these figures support the Company's position that employer protests and appeals, when necessary, are taken in good faith, and are not designed to withhold benefits from deserving employees.

5. The possible impact upon the Company if the decision of the District Court invalidating Section 1335 of the Code is upheld, could be substantial:

(a) If the disbursements from the Fund exceed the total revenues in a twelve-month period, and the Company is accordingly required to pay taxes based upon the first $4,100 of wages rather than the first $3,800 of wages under Section 930 of the Code, the amount of additional taxes payable on wages earned in a year like 1969 would be $1,331, or 7%;

(b) Increased disbursements from the Fund could also place the Company under the higher tax schedule in Section 977, rather than the low schedule in Section 978. If the Company were required to pay under the high tax schedule, which would occur if the year-end balance in the Fund amounts to less than 5% of the wages in employment, in a year like 1969 the Company would be required to pay at the increased rate of 2.7%, including the 1.0% balancing account tax rate. Based on 1969 payrolls, payments at this rate would have increased the Company's taxes by $4,268, or 22.7%. If the high taxable wage base and the high tax schedule had been operative in 1969,

total unemployment taxes, including the 1.0% balancing account tax, would have totaled $24,658, an increase of $5,881, or 31.3%.

6. The Company believes the foregoing figures demonstrate that it has a significant economic interest in the pending litigation. The deposition of the action, in the absence of the Company's joinder as a party defendant, would leave the Company's interest unprotected; that interest differs from that of the State of California and its agents to the extent that the Company's interest may not be adequately represented by those parties.

/s/ Standish K. Penton
Standish K. Penton

Subscribed and sworn to before me, this 11 day of August, 1970.

/s/ Lars J. Madsen, Notary Public in and for said State and County.

[Seal]

EXHIBIT D.

State of California, County of Los Angeles—ss:

RICHARD C. LAWTON, being first duly sworn, deposes and says:

1. I am the President of Transit Mixed Concrete Company (hereinafter the "Company"), and I was the President thereof during the times mentioned herein. I make this affidavit on the basis of my best knowledge and belief, and in support of the application of the Company for leave to intervene as a party defendant.

2. The Company, a California corporation with its principal place of business in Los Angeles, California, is engaged in the business of preparing and delivering ready-mixed concrete to job sites in Los Angeles County. As an employer within the State of California, the Company pays unemployment insurance contributions as required by the California Unemployment Insurance Code (hereinafter the "Code"). Pursuant to Section 1335 of the Code, the Company may appeal an initial determination of eligibility for unemployment insurance benefits, under which payments of benefits to a claimant are suspended pending the outcome of the appeal.

3. The Company employed 225 employees within the State of California in the calendar year ending December 31, 1969, and based on taxable wages totaling $913,474 during that period, paid $12,619 into the State of California Unemployment Fund (hereinafter the "Fund"). That amount reflects the Company's tax rate of 1.4% of employees' wages in 1969, including the 1.0% balancing account tax rate. The current

1970 tax rate is 0.8%, including a balancing account rate of 0.8%.

4. In calendar year 1969, 80 claims for unemployment compensation were filed by Company employees. The Company protested 8 of these claims to the Department of Human Resources Development, which upheld the Company's position in 6 of the 8 instances. The two adverse rulings were subsequently appealed to a Referee of the Unemployment Insurance Appeals Board, resulting in a reversal of the Department's determination, and a decision favorable to the Company. Thus, each protest against the payment of unemployment insurance benefits filed by the Company in 1969 was ultimately found to be meritorious. I believe these figures support the Company's position that employer protests and appeals are taken in good faith, and are not designed to withhold benefits from deserving employees.

5. The possible impact upon the Company, if the decision of the District Court invalidating Section 1335 of the Code is upheld, could be substantial:

(a) If the disbursements from the Fund exceed the total revenues in a twelve-month period, and the Company is accordingly required to pay taxes based upon the first $4,100 of wages rather than the first $3,800 of wages under Section 930 of the Code, the amount of additional taxes payable on wages earned in a year like 1969 would be $923, or 7.0%;

(b) Increased disbursements from the Fund could also place the Company under the higher tax schedule in Section 977, rather than the low schedule in Section 978. If the Company were required to pay under the high tax schedule, which would occur if the year-end

balance in the Fund amounts to less than 5% of the wages in employment, in a year like 1969 the Company would be required to pay at the increased rate of 2.0%, including the 1.0% balancing account tax rate. Based on 1969 payrolls, payments at this rate would have increased the Company's taxes by $5,481 or 42.8%. If the high taxable wage base and the high tax schedule had been operative in 1969, total unemployment taxes, including the 1.0% balancing account tax, would have totaled $19,558, an increase of $6,799, or 53.2%.

6. The Company believes the foregoing figures demonstrate that it has a significant economic interest in the pending litigation. The disposition of the action, in the absence of the Company's joinder as a party defendant, would leave the Company's interest unprotected; that interest differs from that of the State of California and its agents to the extent that the Company's interest may not be adequately represented by those parties.

/s/ Richard C. Lawton
Richard C. Lawton

Subscribed and sworn to before me this 6 day of August, 1970.

Raymond J. Schluter
Notary Public in and for said
State and County.

[Seal]

EXHIBIT E.

State of California, County of Los Angeles—ss.

WILLIAM L. PARKER, being first duly sworn, deposes and says:

1. I am the Director of Corporate Relations of American Cement Corporation (hereinafter the "Company"), and I held that position during the times mentioned herein. I make this affidavit on the basis of my best knowledge and belief, and in support of the application of the Company for leave to intervene as a party defendant.

2. The Company, a Delaware corporation, is engaged in the manufacture of cement, prefabricated steel components, and swimming pool equipment. As an employer within the State of California, the Company pays unemployment insurance contributions as required by the California Unemployment Insurance Code (hereinafter the "Code"). Pursuant to Section 1335 of the Code, the Company may appeal an initial determination of eligibility for unemployment insurance benefits, under which payments of benefits to a claimant are suspended pending the outcome of the appeal.

3. The Company employed an average of 845 employees within the State of California in the calendar year 1969, and based on taxable wages totaling $3,706,212 during that period, paid $51,887 into the State of California Unemployment Fund (hereinafter the "Fund"). That amount reflects the Company's tax rate of 1.4% of employees wages in 1969, including the 1.0% balancing account tax rate.

4. The possible impact upon the Company if the decision of the District Court invalidating Section 1335 of the Code is upheld, could be substantial:

(a) If the disbursements from the Fund exceed the total revenues in a twelve-month period, and the Company is accordingly required to pay taxes based upon the first $4,100 of wages rather than the first $3,800 of wages under Section 930 of the Code, the amount of additional taxes payable on wages earned in a year like 1969 would be $6,981, or 13.5%.

(b) Increased disbursements from the Fund could also place the Company under the higher tax schedule in Section 977, rather than the low schedule in Section 978. If the Company were required to pay under the high tax schedule, which would occur if the year-end balance in the Fund amounts to less than 5% of the wages in employment, in a year like 1969 the Company would be required to pay at the increased rate of 2.0%, including the 1.0% balancing account tax rate. Based on 1969 payrolls, payments at this rate would have increased the Company's taxes by $25,235, or 42.9%. If the high taxable wage base and the high tax schedule had been operative in 1969, total unemployment taxes, including the 1.0% balancing account tax, would have increased by $32,211, or 62.1%.

5. The Company believes the foregoing figures demonstrate that it has a significant economic interest in the pending litigation. The disposition of the action, in the absence of the Company's joinder as a party defend-

ant, would leave the Company's interest unprotected; that interest differs from that of the State of California and its agents to the extent that the Company's interest may not be adequately represented by those parties.

/s/ William L. Parker
William L. Parker

Subscribed and sworn to before me this 26th day of August, 1970.

Carol A. Williams
Notary Public in and for said
State and County.

[Seal]

EXHIBIT F.

State of California, County of Los Angeles—ss.

RALPH W. JONES, being first duly sworn, deposes and says:

1. I am the President of West Coast Chain Mfg. Co. (hereinafter the "Company"), and I was the President thereof during the times mentioned herein. I make this affidavit on the basis of my best knowledge and belief, and in support of the application of the Company for leave to intervene as a party defendant.

2. The Company, a California corporation with its principal place of business in Pasadena, California, is engaged in the business of manufacturing weldless chain, stainless steel key chains, and key chain reels. As an employer within the State of California, the Company pays unemployment insurance contributions as required by the California Unemployment Insurance Code (hereinafter the "Code"). Pursuant to Section 1335 of the Code, the Company may appeal an initial determination of eligibility for unemployment insurance benefits, under which payments of benefits to a claimant are suspended pending the outcome of the appeal.

3. The Company employed an average of 15 employees within the State of California in the calendar year ending December 31, 1969, and based on taxable wages totaling $61,158 during that period, paid $734 into the State of California Unemployment Fund (hereinafter the "Fund"). That amount reflects the Company's tax rate of 1.2% of employees' wages in 1969, including the 1.0% balancing account tax rate.

4. In calendar year 1969, one claim for unemployment compensation was filed by a Company employee.

The Company protested the claim to the Department of Human Resources Development, which upheld the Company's position. For the twelve-month period ending May 15, 1970, 3 claims were filed, 2 of which the Company protested. Both protests were upheld, obviating the necessity for any appeals to the Unemployment Insurance Appeals Board. I believe these figures support the Company's position that employer protests and appeals are taken in good faith, and are not designed to withhold benefits from deserving employees.

5. The possible impact upon the Company, if the decision of the District Court invalidating Section 1335 of the Code is upheld, could be substantial:

(a) If the disbursements from the Fund exceed the total revenues in a twelve-month period, and the Company is accordingly required to pay taxes based upon the first $4,100 of wages rather than the first $3,800 of wages under Section 930 of the Code, the amount of additional taxes payable on wages earned in a year like 1969 would be $40, or 5.5%;

(b) Increased disbursements from the Fund could also place the Company under the higher tax schedule in Section 977, rather than the low schedule in Section 978. If the Company were required to pay under the high tax schedule which would occur if the year-end balance in the Fund amounts to less than 5% of the wages in employment, in a year like 1969 the Company would be required to pay at the increased rate of 1.9%, including the 1.0% balancing account tax rate. Based on 1969 payrolls, payments at this rate would have increased the Company's taxes by $428 or 58.3%. If the high taxable wage base and the high

tax schedule had been operative in 1969, total unemployment taxes, including the 1.0% balancing account tax, would have increased by $490, or 66.8%.

6. The Company believes the foregoing figures demonstrate that it has a significant economic interest in the pending litigation. The disposition of the action, in the absence of the Company's joinder as a party defendant, would leave the Company's interest unprotected; that interest differs from that of the State of California and its agents to the extent that the Company's interest may not be adequately represented by those parties.

/s/ Ralph W. Jones
Ralph W. Jones

Subscribed and sworn to before me this 11th day of August, 1970.

Barbara W. Deadrick,
Notary Public in and for said County and State.

EXHIBIT G.

State of California, County of Los Angeles—ss.

ROBERT W. CONDON, being first duly sworn, deposes and says:

1. I am the Assistant Vice President of Occidental Life Insurance Company of California (hereinafter the "Company"), and I was the Assistant Vice President thereof during the times mentioned herein. I make this affidavit on the basis of my best knowledge and belief, and in support of the application of the Company for leave to intervene as a party defendant.

2. The Company, a California corporation with its principal place of business in Los Angeles, California, is engaged in the business of selling life, accident, and health insurance policies. As an employer within the State of California, the Company pays unemployment insurance contributions as required by the California Unemployment Insurance Code (hereinafter the "Code"). Pursuant to Section 1335 of the Code, the Company may appeal an initial determination of eligibility for unemployment insurance benefits, under which payments of benefits to a claimant are suspended pending the outcome of the appeal.

3. The Company employed an average of 3,398 employees within the State of California in the calendar year ending December 31, 1969, and based on taxable wages totaling $13,967,151 during that period, paid $223,474 into the State of California Unemployment Fund (hereinafter the "Fund"). That amount reflects the Company's tax rate of 1.6% of employees' wages in 1969, including the 1.0% balancing account tax rate.

4. In calendar year 1969, 389 claims for unemployment compensation were filed by Company employees. The Company protested 321 of these claims to the Department of Human Resources Development, which upheld the Company's position in 187 instances. Twenty-seven rulings adverse to the Company were appealed to a Referee of the Unemployment Insurance Appeals Board, resulting in a reversal of the Department's determination in eight cases; a decision favorable to the claimant was rendered in 3 cases (fifteen were withdrawn as the claimants found employment and one is pending). I believe these figures support the Company's position that employer protests and appeals are taken in good faith, and are not designed to withhold benefits from deserving employees.

5. The possible impact upon the Company, if the decision of the District Court invalidating Section 1335 of the Code is upheld, could be substantial:

(a) If the disbursements from the Fund exceed the total revenues in a twelve-month period, and the Company is accordingly required to pay taxes based upon the first $4,100 of wages rather than the first $3,800 of wages under Section 930 of the Code, the amount of additional taxes payable on wages earned in a year like 1969 would be $6,705 or 3.0%;

(b) Increased disbursements from the Fund could also place the Company under the higher tax schedule in Section 977, rather than the low schedule in Section 978. If the Company were required to pay under the high tax schedule, which would occur if the year-end balance in the Fund amounts to less than 5% of the wages in employment, in a year like 1969 the Company would be required to pay at the increased rate of

2.1%, including the 1.0% balancing account tax rate. Based on 1969 payrolls, payments at this rate would have increased the Company's taxes by $69,836 or 31.0%. If the high taxable wage base and the high tax schedule had been operative in 1969, total unemployment taxes, including the 1.0% balancing account tax, would have increased by $78,836, or 35.2%.

6. The Company believes the foregoing figures demonstrate that it has a significant economic interest in the pending litigation. The disposition of the action, in the absence of the Company's joinder as a party defendant, would leave the Company's interest unprotected; that interest differs from that of the State of California and its agents to the extent that the Company's interest may not be adequately represented by those parties.

/s/ ROBERT W. CONDON
Robert W. Condon

Subscribed and sworn to before me, this 5th day of July, 1970.

Frank R. Lutz, Notary Public in and for said State and County.

[Seal]

EXHIBIT H.

Affidavit of Willard Z. Carr, Jr. in Support of Motion of the Applicants for Leave to Intervene.

State of California, County of Los Angeles—ss.

Willard Z. Carr, Jr., being first duly sworn, deposes and says:

I am an attorney for the applicants for intervention, Southern California Edison Co., California Metal Enameling Co., Transit Mixed Concrete Co., American Cement Corp., West Coast Chain Manufacturing Co., and Occidental Life Insurance Co., and have been designated as such since May 5, 1970. This affidavit is submitted in support of the motion of the applicants for leave to intervene as defendants and to demonstrate to the Court that because leave to intervene could not be sought in the District Court, under the circumstances of this case the applicants' motion at this stage of the proceedings is timely.

1. I first learned of the existence of the instant litigation late in the Fall of 1969, shortly before the defendants filed a motion to dismiss the complaint for failure to join indispensable parties on December 5, 1969. During this period I was furnished copies of the pleadings then on file by the Office of the Attorney General of the State of California.

2. I relayed the information I had received to David G. Soash, Executive Vice-President of the Merchants and Manufacturers Association, and Mrs. Geraldine M. Beideman, Research Director of the California Employers Research Council, for whom I have acted as counsel in connection with other unemployment insurance matters, in accordance with continuing requests

from those organizations to apprise them of the existence of litigation in which the employer community might be concerned.

3. Shortly thereafter, I was requested to undertake a study of the case in order to determine its significance, and to advise Mr. Soash and Mrs. Beideman of my conclusions.

4. After preparing a summary of conclusions with the aid of an associate in my law firm, the information and recommendations contained therein were forwarded to Mrs. Beideman and Mr. Soash. I was informed that Mr. Soash would discuss our recommendations with interested employers.

5. During the Spring if 1970, the defendants' motion to dismiss was under submission by the District Court. In a similar case filed in the Northern District of California, *Romero v. Wirtz* (N.D. Cal. 1969), Civil No. 50213, the Three-Judge Court dismissed the action for failure to join employers, with leave to amend. Two of the three judges who heard *Romero* were on the panel in the instant case. In light of that action, we informed Mr. Soash that upon receiving word of a favorable ruling by the Court on the motion to dismiss in the instant case and upon receiving authority to proceed, we would take the necessary steps to have interested employers joined as defendants.

6. By letter dated May 5, 1970, Mr. Soash authorized us to act on behalf of Southern California Edison Co., California Metal Enameling Co. and Transit Mixed Concrete Co. and to seek their joinder as defendants. Since the Court had not ruled on the defendants' motion to dismiss, it was decided to seek joinder through a formal motion to intervene.

7. In order that the employers' interests in the litigation could be demonstrated to the Court in support of a motion to intervene, we began gathering factual information from the employers, the Department of Human Resources Development, and the California Employers Research Council. Although the necessary legal documents for the motion had been prepared, the factual information gathered with respect to the three original employers was not received until after the District Court entered its preliminary injunction on May 14, 1970.

8. The information concerning the three original employers, as well as that of the three employers who subsequently requested that they be joined as defendants, was still being collected when notice of appeal was filed in this cause.

The foregoing facts establish that neither the Applicants nor their counsel have been dilatory in their efforts to secure joinder of the employers as defendants in this litigation. It is submitted that the motion to intervene at the appellate level would not have been necessary if the District Court had ruled on the defendants' motion and dismissed the action with leave to amend. Had that action been taken, as it was in *Romero, supra,* the Applicants would have had an opportunity to be heard in the District Court prior to that Court's ruling on the motion for preliminary injunction. Even if the motion to dismiss had been denied, the Applicants could have taken the necessary steps prior to the decree granting the injunction to seek intervention. Since no action was taken on the motion to dismiss, and the preliminary injunction was granted, the Applicants' only recourse is to seek to intervene before this Court.

I declare that the foregoing information is true and correct to the best of my knowledge and belief.

/s/ Willard Z. Carr, Jr.
Willard Z. Carr, Jr.

Subscribed and sworn to before me, this 23rd day of October, 1970.

Barbara W. Deadrick,
Notary Public

My Commission Expires May 9, 1973.

[Seal]

EXHIBIT I.

Order Granting Motion to Dismiss.

In the United States District Court for the Northern District of California.

Ramon Romero, et al., Plaintiffs, vs. Willard Wirtz, etc.; et al., Defendants.

BEFORE: OLIVER D. HAMLIN, U. S. CIRCUIT JUDGE, ALFONSO J. ZIRPOLI and ALBERT C. WOLLENBERG, U. S. DISTRICT JUDGES.

Plaintiffs have filed this action for damages, declaratory and equitable relief, alleging that the California and federal statutes which exclude agricultural labor from their definitions of "employment" for the purposes of unemployment compensation violate the due process and equal protections clauses of the Constitution of the United States.

It is apparent that, assuming hearings are held on this question, any relief granted may well affect the interests of the agricultural employers presently exempted from the unemployment compensation schemes here under challenge. These employers are not named in this action. We therefore dismiss the action with leave to amend the complaint accordingly. Plaintiff is granted thirty (30) days to amend complaint.

Dated: October 17, 1969.

/s/Oliver D. Hamlin
United States Circuit Judge

/s/ Albert C. Wollenberg
United States District Judge

/s/ Alfonso J. Zirpoli
United States District Judge

FILE COPY

FILED
NOV 16 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief in Opposition to Motion of Southern California Edison, et al., to Intervene

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
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JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief in Opposition to Motion of Southern California Edison, et al., to Intervene

I.

PRELIMINARY STATEMENT

On November 9, 1970, six California employers filed a Motion to Intervene in the present case. Appellees oppose this Motion for several reasons.

First, we submit that applicants' interest in the subject of this action is not a substantial one. As individual employers, applicants are members of a large class of Cali-

fornia employers. If the District Court decision appealed from is affirmed, and payment to an eligible claimant is required during the pendency of his past employer's appeal, that individual employer will suffer no direct financial loss. Any possible loss that might occur would be a collective one, spread over all California employers.

Secondly, we contend that applicants have overstated and exaggerated their interest in this case. Appellees will elaborate on this contention in a subsequent part of this brief.

Appellees further submit that any legitimate interest of the applicants has been and will be adequately represented by the Attorney General of the State of California and the Chief Counsel of Appellant Department of Human Resources Development. Moreover, as amici curiae, applicants will be able to further represent their interest in this litigation.

Finally, appellees submit that the Motion to Intervene is not timely. Applicants had ample time to intervene as formal parties when this case was before the court below. By choosing to wait until this case was before this Court, applicants should be prevented from intervening as formal parties.

II.

APPLICANTS' MOTION TO INTERVENE OF RIGHT SHOULD BE DENIED

A. Applicants' Interest in This Lawsuit Is Indirect and Insufficient to Warrant Their Intervention.

The 1966 amendment to Rule 24(a) states that an applicant for intervention must claim an interest relating to the property or transaction which is the subject of the action. This rule has been interpreted to require that such claim of

interest be legally sufficient from an objective standpoint, *Kheel v. American S. S. Owners Mut. Prot. and Indem. Assoc.* (S.D.N.Y. 1968), 45 F. R. D. 281; *Norwalk Core v. Norwalk Bd. of Ed.*, (D. Conn. 1968), 298 F.Supp. 208, as well as direct, substantial, and legally protectible. *Hobson v. Hansen*, (D.D.C. 1968) 44 F. R. D. 18.

Applicants, as individual employers, do not have the direct and substantial interest that is legally required for intervention. They contend that, if appellees prevail in this case, they will be subject to a "substantial increase in unemployment taxes." See Applicants' Motion, 9. Applicants allege that this increase would result from excessive disbursements from the general unemployment fund—such disbursements resulting from unrecovered overpayments (in the form of benefits) received by claimants whose initial determination of eligibility has been overruled by a referee. Applicants contend that these overpayments would necessitate an increase in their tax rate in order to compensate for the alleged losses suffered by the fund.

The proposition that an increase in the employers' tax would be required if appellees prevail is, at most, speculative. (See Part II B, 5 *infra*). However, even if we assume, *arguendo*, that the necessity for an increase in the employers' fund would arise, this would be borne by and spread over all California employers. The effect of such an increase on the individual employer would be relatively small. (See Part II B 6, 7 *infra*.) Thus, the interest of applicants is no greater than that of employees' groups and other organizations that may be affected by the Court's decision in this case. Applicants' financial stake may motivate their interest. This interest, however, is remote and not substantial enough to warrant intervention.

Applicants have relied heavily on the case of *Cascade Natural Gas Co. v. El Paso Natural Gas Co.* (1967), 386

U.S. 129, to show that private parties have a legally protectible private interest in issues of public interest. *Cascade* was an antitrust action in which the United States brought suit to compel El Paso Natural Gas Co. to divest itself of its subsidiary—Pacific Northwest Pipeline Co. The original decision of the lower court was appealed to the Supreme Court which, in turn, remanded the case to the District Court and ordered divestiture. At this point Cascade Natural Gas Co. and the State of California sought intervention. The facts and principles in *Cascade* are clearly distinguishable from the present case. First, the Motion for Intervention in *Cascade* was to the District Court, not to the Supreme Court, as here. Second, the movants for intervention in *Cascade* were customers of the company which the defendant was alleged to be controlling in violation of the Clayton Act, and the State of California whose citizens allegedly were suffering due to the control of a natural gas supply by the defendant. These movants were the very parties who were intended to benefit from the government's action in compelling divestiture. In allowing intervention, the Court stated that the protection of California's interests in a competitive system was "at the heart of the matter." 386 U.S. at 135.[1]

---

1. It should be noted that, notwithstanding the fact that the applicants' interest in *Cascade* was more direct in nature, subsequent cases have tended to limit *Cascade* to its peculiar fact situation. *See e.g. United States v. Aluminum Co. of America* (E.D. Mo. 1967), 41 F. R. D. 342 *aff'd per curiam sub nom. Lupton Mfg. Co. v. United States* (1967) 388 U.S. 457; *United States v. Blue Chip Stamp Co.*, (C.D. Cal. 1967), 272 F.Supp. 432, *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States* (1968), 389 U. S. 580, *reh. den.*, 390 U. S. 975. *See also Moore v. Tangipahoa Parish School Board.* (E.D. La. 1969), 298 F.Supp. 288; *Hobson v. Hansen*, (D.D.C. 1968), 44 F. R. D. 18; Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV., 721, 730 (1968); Kaplan, *1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 406 (1967).

In this case, however, applicants' interest is not sufficient to be considered at the "heart of the matter." As stated before, as individual employers, the only loss that applicants might suffer would be a collective one, borne by all California employers. This, coupled with the fact that applicants' alleged loss is very speculative, distinguishes *Cascade* from the present case.

B. The Employers' Claimed Financial Loss as a Result of the Decision Appealed from Is Grossly Overstated and Speculative.

Applicants contend that if the case at bar is affirmed, there will be an increase in the employers' taxes which would, in turn, lead to an increase in the amount of taxes paid by each employer. This rise in the tax rate is predicated on a projected loss to the unemployment insurance fund due to payments of benefits which are subsequently determined to be incorrect. This argument completely ignores the fact that the State has several methods of recouping any overpayments in addition to voluntary repayment by agreement, such as offsets against future unemployment or disability benefits and restitution to avoid criminal prosecution. California Unemployment Insurance Code Sections 1379 and 2113. Thus, applicants' contention that there will be a significant loss to the fund must be considered in light of these statutory devices.

At present, the reserves of the unemployment insurance fund are sufficiently ample so that employers are taxed at minimum rates. We are not told how much of a loss in unrecouped overpayments would be suffered before any effect on general employer taxes would result. Thus, the claimed financial stake is speculative and we don't know whether employers will ever feel the effect of this decision, or at what point it may be felt.

Applicants suggest that the implementation of the relief sought by appellees could result in the imposition of the highest possible rates in each of the three tax schemes used to support the unemployment fund. See Applicants' Motion to Intervene, 8-10. If we assume, *arguendo,* that each of the three separate taxes supporting the fund was raised to its highest level, the combined additional revenue to the fund in a year like 1968 would be 154 *million* dollars. See Affidavit of J. E. McNeil, dated November 19, 1969, paragraph 2(c), attached hereto as Exhibit A. However, appellants' statisticians estimate that the maximum amount of overpayment that would have resulted in the year 1968, if the challenged statute had not been in effect, would have been $800,000. See Affidavit of George Roche, dated November 18, 1969, paragraph I(3), attached hereto as Exhibit B. Of that amount, an average of 64 percent would have been recovered. See Affidavit of Nicolo Pino, dated July 20, 1970, paragraph E, attached to Appellant's Jurisdictional Statement as Appendix C. Thus, the net hypothetical loss to the fund would have been $288,000 for the year, (36 percent of $800,000). While substantial, it serves to show that the claims of applicants are exaggerated, because the amount of actual, unrecouped overpayment would have been .0019 (nineteen-ten thousandths) of the amount that applicants suggest would have been needed in increased taxes to pay for the overpayments, $\frac{(\$288{,}000\ )}{(\$154\ \text{Million})}$. Since the amounts by which the individual applicants claim their taxes would have been increased, were also based on the highest possible rates, they must be reduced by the same factor. Thus, in the case of applicant Southern California Edison, the applicant claiming the largest potential increase in taxes, the increase would be reduced from a claimed $434,341.00 to $825.25 a year. ($434,341.00 x .0019) See Affi-

davit of C. H. Faulkner, dated August 7, 1970, paragraph 5(b), attached to Applicants' Motion as Exhibit B. The alleged increase in the case of the applicant claiming the smallest increase would be $ .93 instead of the claimed $490.00 per year, ($490.00 x .0019). See Affidavit of Ralph W. Jones, dated August 11, 1970, paragraph 5(b), attached to Applicants' Motion as Exhibit F. This appears to indicate that while there may be some increase in taxes, its significance is highly exaggerated and the only party with a very substantial interest is the State which must administer the entire unemployment insurance program.

C. Any Interest Assertable by the Applicants in These Proceedings Is Adequately Represented by Appellant.

Intervention of Right should not be granted if it is shown that the applicants' interest is adequately represented by the existing parties. Fed. Rules Civ. Proc. Rule 24(a)(2), 28 USCA; See generally, 3B *Moore's Federal Practice Para.* 24.09-[4]; 2 *Barron & Holtzoff, Federal Practice and Procedure* Section 597 (Supp. 1969). The question of what constitutes adequacy of representation was analyzed in *Peterson v. United States* (D. Minn. 1966), 41 F. R. D. 131, which involved a Motion to Intervene by two remaindermen of a trust in an action to recover federal estate taxes. The Motion was denied, notwithstanding the fact that the interests of the plaintiffs and the movants might have been different in some respects. The court stated: "The controlling rule is that representation is adequate if there is no collusion between the representative and an opposing party, if the representative does not have or represent an interest adverse to the applicant, and if the representative does not fail in the fulfillment of his duty." *Peterson v. United States* (D. Minn. 1966), 41 F. R. D. 131, 133; accord, *Hatton v. County Bd. of Ed. of Maury County, Tenn.* (6th Cir. 1970), 422 F.2d 457.

In *Hatton* the court denied a petition to intervene on behalf of white parents and students who wished to oppose a desegregation plan adopted by the Board pursuant to the order of the District Court. It was found that there was an interest sufficient for intervention but that petitioners' interest did not lack adequate representation because defendants had raised every reasonable defense and the petitioners had made no allegation of fraud, collusion, bad faith or negligence on the part of the Board. The case at bar is directly on point with *Peterson* and *Hatton*. In the present case, there is clearly no collusion between the present parties; nor does the State have an interest adverse to applicants; nor can it be said that the Attorney General of the State of California lacks the competence and the resources to adequately represent the interest of applicants.[2]

The cases on which applicants have relied to show inadequacy of representation are not applicable to this case. Only one of these cases, *Smuck v. Hobson* (D.C. Cir. 1969), 408 F.2d 175, involved a private party attempting intervention to advocate a private interest in a policy defended by a public body. *Smuck* embraced the identical issue raised in *Hatton, supra:* whether parents of white children should be allowed to intervene in a desegregation suit brought against a school board. However, the reason that intervention was allowed in *Smuck* was that the defendant school board in *Smuck* declined to appeal the lower court decision that was adverse to the petitioner's interests. Thus, the

2. There is no suggestion, as in the *Cascade* case, that the State and the private parties may differ as to the relief requested. Applicants argue in Part III of their motion that "In this instance, the questions of law and fact posed by the applicants *are identical* to the questions already framed in the original pleadings". See Applicants' Motion 17 (emphasis added). It certainly seems inconsistent for applicants to allege that appellants are not adequately representing their position in light of these circumstances.

only way the case could have been heard on appeal would have been by permitting intervention at the appellate level. On this basis, the court in *Smuck* found a lack of adequate representation and allowed intervention. In the present case, of course, the defendant has not failed to appeal.

In *Nuesse v. Comp.* (D.C. Cir. 1967), 385 F.2d 694, the Wisconsin Commissioner of Banks was granted intervention to protect the public interest between a private state bank and the United States. The court found that adequacy of representation was lacking because the issues involved the competitive position of all state banks while the original plaintiff was only concerned with its own competitive position. If anything, *Nuesse* supports appellees' position in this case that the State is the only representative capable of defending the interests of all employers as opposed to those of individual employers.

In *Ford Motor Co. v. Bizanz Bros. Inc.* (8th Cir., 1957), 249 F.2d 22, Ford attempted to intervene in an action brought to enjoin the operation of a railroad. Ford alleged the injunction would have deprived it of necessary transportation facilities. The railroad was not charged with representing Ford's interest in retaining essential railroad services. In the case at bar, however, the State has the duty to represent the employers' interest in the unemployment insurance fund.

In attempting to differentiate their interest from the State's, applicants contend that their interest is in preserving their right to due process before benefits are paid while the States' interest is an administrative concern. This is a distinction in semantics. Appellants have an interest and a duty to insure fairness to all parties—employers and employees alike. There simply is no reason to assume that applicants' interest is not being adequately represented in the case at bar.

D. Applicants' Motion to Intervene Is Untimely.

Intervention at the appellate level is very infrequently granted. See 3B *Moore's Federal Practice,* paragraph 24.13 [1] (1969) at 24-526. In *United States v. Blue Chip Stamp Co.,* (C.D. Cal. 1967), 272 F.Supp. 432, *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States* (1968) 389 U.S. 580, rehearing denied 390 U.S. 975, the court declared:

> "A motion to intervene after entry of a final decree should be denied as untimely in other than the most unusual circumstances." 272 F.Supp. 432 at 436.

An examination of the authorities cited by applicants shows that the unusual circumstances present therein are far different from the present case. In *Automobile Workers v. Scofield* (1965), 382 U.S. 205, petitioners for intervention were successful parties to a proceeding before the NLRB. Pursuant to a unique section of the Labor Act, only parties *adversely* affected by a decision of the NLRB could appeal. The result was that, although the successful party was actually a party to the proceedings below, it could not be heard on appeal. If the decision of the NLRB were reversed by the Court and remanded to the Board, and the NLRB subsequently entered a decision adverse to the former successful party, such party then became the party adversely affected by the decree and could then re-appeal. The Supreme Court allowed intervention to the appellate court to avoid a multiplicity of actions. In the case at bar, the applicants, failing to seek intervention in the action in the court below, were never parties to that action. If they had intervened at the proper time, it would not be necessary for them to seek intervention at the appellate level.

The two other cases relied on by applicants involved situations in which the original parties failed to appeal a judgment adverse not only to their interests, but also to the interests of the petitioners for intervention, thereby depriving petitioners of any representation of their interests at the appellate level. *Smuck v. Hobson* (D.C. Cir. 1969), 408 F.2d 175; *Wolpe v. Poretsky* (D.C. Cir. 1944), 144 F.2d 505, *cert. denied* (1944), 323 U.S. 777. In any event, none of the cases cited by applicants involved a case where intervention to the Supreme Court was granted.

Moreover, it is grossly unjust to allow applicants to claim that they did not have an opportunity to intervene in the court below. In a recent case it was shown that petitioners for intervention had been intimately involved in a suit from its inception but failed to intervene until one month after summary judgment was granted. The appellate court denied the motion because it was untimely. *Westward Coach Mfg. Co. v. Ford Motor Co.*, (7th Cir. 1968), 338 F.2d 627, cert. denied 392 U.S. 927. In the present case, applicants were aware of this litigation even before appellants filed their Answer and Motion to Dismiss. See Affidavit of Willard Z. Carr, Jr., dated October 23, 1970, 24, attached to Applicants' Motion as Exhibit H.

Counsel for applicants further attempts to justify their failure to intervene on the ground that he was not authorized to proceed until May 5, 1970 and was waiting in reliance on the possibility that the lower court would dismiss with leave to amend for failure to join indispensable parties. *Ibid.* While applicants might have an excuse for their procrastination if their counsel had not acted promptly despite authorization, they can hardly use their own neglect in authorizing counsel to represent them as an excuse for failing to make a timely motion. The issue is not whether

their counsel took timely action but whether his clients did. Moreover, such excuses fail to explain why applicants waited until October 30, 1970, to file their motion. As stated by their counsel, "although the necessary legal documents for the motion had been prepared, the factual information gathered with respect to the three original employers was not received until after the District Court entered its preliminary injunction on May 14, 1970". *Id.* at 26. The date of the latest affidavit by the applicants giving such factual information is August 26, 1970. See Affidavit of William L. Parker, dated August 26, 1970, attached to Applicants' Motion. No reason is given why applicants waited over two months before filing this Motion.

If the applicants had no one to represent their interest, or if those purporting to represent such interests had not provided sufficiently effective advocacy to assure the court below of a full and competent exposition of the question, the lateness of the Motion would be more excusable. However, the present circumstances fall far short of the unusual conditions necessary to grant intervention of right at the appellate level, and it would be an ominous precedent to allow volunteer champions to wait until a question has reached the Supreme Court before proclaiming their challenge. Applicants have been given consent by both parties to submit briefs as amici curiae. This will allow them to have their claims heard without undue interference with the course of the litigation.

III.

PERMISSIVE INTERVENTION PURSUANT TO RULE 24(b) SHOULD NOT BE GRANTED AT THIS STAGE OF THE LITIGATION

Applicants have failed to raise any issues different from those raised by appellants. Moreover, applicants have had

ample time to seek intervention while this action was before the court below. Even assuming, *arguendo,* that applicants may have claims or defenses involving questions of law or fact in common with this action, a mere general interest in the outcome of the litigation is still not sufficient to warrant permissive intervention. 3B *Moore's Federal Practice,* para. 24.10[2] (1969); *cf. United States v. Aluminum Co. of America* (E.D. Mo. 1967), 41 F. R. D. 342, *aff'd per curiam sub nom. Lupton Mfg. Co. v. United States* (1967), 388 U.S. 457; *United States v. Chicago Title and Trust Co.* (N. D. Ill. 1966), 242 F.Supp. 56.

Permissive intervention in District Court is subject to the exercise of the court's discretion and, in exercising that discretion, the court must take into consideration the delay and prejudice to the adjudication of the rights of the parties that may result. Fed. Rules Civ. Proc. Rule 24(b), 28 USCA. Thus, the requirement of timeliness becomes much more significant in connection with permissive intervention because of its discretionary nature. Where the applicants have nothing new to add and are adequately represented in the trial court, and intervention would result in additional delay, the denial of permissive intervention is proper. See *Allen Calculators, Inc. v. National Cash Register Co.* (1944) 322 U.S. 137. This is especially true where applicants are attempting to intervene as parties appellant. See *McKenna v. Pan Am Petroleum Corp.* (5th Cir. 1962), 303 F.2d 778.

If there were no way in which applicants could submit their viewpoint to the Court, it might be different. But applicants have been given consent by the parties to appear as amici curiae and are thus assured that their contribution to the testing of this issue will not be ignored. The adequacy of this alternative was approved by the court in *Crosby*

Steam Gage and Valve Co. v. Manning, Maxwell and M... Inc. (D. Mass. 1943), 51 F.Supp. 972. There, the ... stated:

> "Where he presents no new questions, a third p... can contribute usually most effectively and al... most expeditiously by a brief amicus curiae and ... by intervention." 51 F.Supp. at 973.

If this is true at the trial court level, it is of even gre... persuasiveness here. If applicants were allowed to in... vene at this time, they would only be capitalizing on t... own tardiness in seeking intervention into this case. The... fore, this motion for permissive intervention should ... denied.

IV.

CONCLUSION

For the above reasons, applicants' Motion to Interve... should be denied.

Respectfully submitted,

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(Exhibits Follow)

Exhibit A

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.
Defendants,

AFFIDAVIT

I, J. E. McNEIL, the undersigned, having been duly sworn, do depose and state that:

1. I am Chief of the Accounting Section of the Department of Human Resources Development of the State of California, and I have custody of the records relating to employers' unemployment insurance tax accounts.

2. I further certify that the best estimate of the difference in taxes payable by employers, in a year like 1968, based on the high and low wage bases and tax rates is as shown in the table below:

a. Taxes payable on
   (1) $4,100 wage base..... $596.7 Million
   (2) $3,800 wage base..... $568.7 Million
   Difference ..... $ 28.0 Million

b. Balancing account taxes payable (using $3,800 taxable wage base) at
   (1) 1.0% general rate..... $191.0 Million
   (2) 0.8% general rate..... $153.0 Million
   Difference ..... $ 38.0 Million

c. Taxes payable (using $3,800 taxable wage base) on

(1) High rate schedule.....	$377.6 Million	
(2) Low rate schedule.....	$289.6 Million	
Difference		$ 88.0 Million
Total Difference		$154.0 Million

I declare under penalty of perjury that the foregoing is true and correct.

/s/ J. E. McNeil
J. E. McNeil

State of California
County of Sacramento } ss.

J. E. McNeil being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 19th day of November, 1969.

/s/ Sydney R. Johnson
Notary Public in and for the
State of California

[Seal]

Exhibit B

United States District Court
Northern District of California

No. C-69 350 ACW

JUDITH JAVA and CARROLL H. HUDSON, et al.
Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.
Defendants,

AFFIDAVIT

I George Roche, the undersigned, having been duly sworn, do depose and state that:

1. I am the Chief of the Research and Statistics Section of the Department of Human Resources Development of the State of California; and I have, in my possession and under my control, the statistical records of the said Department of Human Resources Development relating to unemployment insurance claims filed, eligibility and disqualifications considered and the outcome thereof, appeals filed to referees of the California Unemployment Insurance Appeals Board and the outcome of said appeals, and the amount of unemployment insurance benefits paid by said Department from the Unemployment Fund.

2. The statistical records of the Department of Human Resources Development indicate the following claims, referee appeals, and benefit activity for the calendar year 1968:

A. The total number of claims filed was 960,180.

B. 141,956 of these claims were determined invalid because the claimants had insufficient wages in their base periods.

C. 818,224 of these claims were filed by claimants who had sufficient wages in their base periods to file valid claims.

D. There were 667,993 issues of eligibility for or disqualification from unemployment insurance benefits which resulted in written determinations by the Department.

E. Of the 667,993 issues of eligibility, 401,917 were determined by the Department in favor of the claimant while 266,066 resulted in the claimant being disqualified from receiving unemployment insurance benefits for one or more weeks.

F. In 1968, 45,353 appeals were filed to referees of the California Unemployment Insurance Appeals Board.

G. Referees in 1968 issued 26,509 decisions of which 5,526 were decisions on appeals by employers and 20,983 were decisions on appeals by claimants.

H. Of the 5,526 decisions on appeals by employers, the decision reversed the determination of the Department and held in favor of the employer in 2,602 cases or 47 percent of these decisions. The decision affirmed the determination of the Department and held in favor of the claimant in 2,924 cases or 53 percent of these decisions.

I. A total of $404.3 million was paid in unemployment insurance benefits.

3. If benefits had been paid to the claimants involved in the 2,602 cases in which the employer prevailed before the referee in 1968, the cost of such benefits to the Unemployment Fund would have been approximately $800,000 based upon a weekly benefit amount of $50 and an average duration prior to the referee decision of slightly in excess of six weeks.

4. The statistical records of the Department of Human Resources Development concerning the claims and appeals activity set forth in paragraph 2 hereof for the calendar years 1965, 1966, and 1967, and additional appeals activity for the calendar year 1968 is set forth in the table attached hereto.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ GEORGE S. ROCHE
George Roche

State of California
County of Sacramento } ss.

George Roche being first duly sworn under oath, represents that he has subscribed to the foregoing Affidavit and does state that the information is true and correct to the best of his knowledge and belief.

Subscribed and sworn to before me this 18th day of November, 1969.

/s/ SIDNEY R. JOHNSON
Notary Public in and for the
State of California

[Seal]

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FILED
DEC 2 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

vs.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Brief of the Appellants

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In the Supreme Court of the United States

OCTOBER TERM 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

vs.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Brief of the Appellants

OPINION BELOW

The opinion of the United States District Court for the Northern District of California has been submitted for publication. No citation is available as of this date. A copy of the opinion is included in the Single Appendix. (A. 133.)

JURISDICTION

This suit was brought on behalf of appellees and all others similarly situated for injunctive and declaratory re-

lief under the authority of Title 42, U.S.C., section 1983, and Title 28, U.S.C., sections 1343(3) and 1343(4), and sections 2281 and 2284. Jurisdiction was further invoked under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C., sections 501 et seq. The judgment of the specially constituted District Court was entered on May 14, 1970, and notice of appeal was filed in that court on June 12, 1970. Appellants filed their Jurisdictional Statement on August 7, 1970, and a Supplemental Brief on October 18, 1970, and this Court noted probable jurisdiction on October 26, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C., sections 1253 and 2101(b). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

STATUTES INVOLVED

Two statutes are involved: section 1335 of the California Unemployment Insurance Code and section 503(a)(1) of Title 42 of the United States Code. Section 1335 of the California Unemployment Insurance Code provides as follows:

> "1335. If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:
>
> "(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or
>
> "(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by

the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

The portion of the Social Security Act which is pertinent here is 42 U.S.C., § 503(a)(1), which reads as follows:

"§ 503. STATE LAWS, PROVISIONS REQUIRED; STOPPING PAYMENTS ON FAILURE TO COMPLY WITH LAW

"(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for:

"(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

". . ."

The entire text of 42 U.S.C., § 503 is attached as Appendix A.

QUESTIONS PRESENTED

1. When a claimant for unemployment insurance has been ruled eligible in an initial interview but her last employer appeals that determination, does a procedure which stays payment of benefits until the employer's appeal is decided deprive the claimant of due process?

2. When a claimant for unemployment insurance has been ruled eligible in an initial interview but her last employer appeals that determination, is the requirement of 42 U.S.C., § 503(a)(1) that the state's procedure must be "reasonably calculated to insure full payment . . . when due" satisfied by a procedure which permits payments to be made only after a referee decides the employer's appeal?

3. A subsidiary question is presented because of the district court's ruling that California Unemployment Insurance Code section 1335 is totally invalid: Where a set of facts may reasonably be conceived to save the constitutionality of a state statute, should a federal court nevertheless rule that the statute is unconstitutional in its entirety?

STATEMENT OF THE CASE

Appellees Judith Java and Carroll Hudson and the class they represent are California citizens who (1) have claimed or will claim unemployment insurance benefits, (2) have been initially determined eligible for benefits, and (3) have not received benefits pending an appeal by their last employer. (A. 6.)

In late summer 1969, appellees Java and Hudson applied for unemployment insurance benefits. Pursuant to California procedure, they filled out the necessary forms. Each claimant's last employer contended that benefits should be denied because the claimant was discharged for misconduct or voluntarily quit without good cause. Each claimant was thereafter granted an interview for an initial determination as to eligibility. As a result of these interviews both claimants were ruled eligible for benefits. (A. 8-9.) California procedure further provides that such a determination may be appealed by the last employer within ten days. (Cal. Unemp.Ins. Code § 1335.) During this ten-day period a

claimant may receive one or two payments but once the employer's appeal is filed, no further payments are made until the appeal is decided. (A. 114-115.) Both claimants here received one or two payments until their last employers filed appeals, at which time further payments were withheld. (A. 8-9.) At the subsequent hearings before a referee plaintiff Hudson's eligibility was affirmed, but in the case of Judith Java the referee reversed the initial determination and ruled she had never been entitled to benefits. (A. 41-42.)

Prior to the hearings before the referee appellees brought this class action for declaratory relief and to enjoin enforcement of section 1335 of the California Unemployment Insurance Code, alleging that they and members of their class should be paid benefits during the time an employer's appeal was pending. Defendants filed a motion to dismiss. The relief prayed for by plaintiffs was granted, the court ruling that the instant case was indistinguishable from *Goldberg v. Kelly*, 397 U.S. 254 (1970). (A. 138.) It further ruled that the California statute does not provide a procedure which is reasonably calculated to insure full payment "when due" and the statute is, therefore, inconsistent with section 503(a)(1) of Title 42, U.S.C., the Social Security Act of 1935, as amended. (A. 139.)

SUMMARY OF ARGUMENT

Under California law (Cal.Unemp.Ins. Code § 1335) payments to a claimant initially found eligible by an interviewer may be suspended while an appeal by the claimant's last employer is pending. The United States District Court determined that: (1) this procedure violates due process in that payments should not be suspended without a prior hearing, and (2) that the procedure does not conform to the requirement in 42 U.S.C. § 503(a)(1) that permits fed-

eral participation only if the state program is "reasonably calculated to insure full payment . . . when due".

The court ruled that this case is controlled by *Goldberg v. Kelly*, 397 U.S. 254 (1970). But that case is distinguishable on a number of grounds. First, *Goldberg* was a welfare case and welfare is based on need; unemployment insurance is not. A procedural delay in a program not predicated on need is not as prejudicial as it is in a program where need is a *sine qua non*. Second, in welfare cases there are but two parties, the claimant and the state. In unemployment insurance, there are three: the claimant, the state, and the employer whose money is used to pay the claimant. The delay is unavoidable if the employer is to have an opportunity to be heard, a right which cannot be denied him. Third, in *Goldberg* the claimant's basic eligibility had been established and the question was whether the state could later terminate without a hearing. Here the initial question of eligibility has not yet been decided, and until it is, the claimant can make no claim to a property right or its equivalent.

On the issue of compliance with 42 U.S.C. § 503(a)(1), the lower court erred in ruling that the initial determination by an interviewer was enforceable at that point and that payments were immediately due. In the few cases where an employer asks to be heard, the initial decision-making process is not complete until he has presented his case and payments should, therefore, not be ruled "due" at any earlier stage. In any event, "due" means "fixed" or "owing", a status which has not been reached at the initial determination. This interpretation is confirmed by the fact that the Secretary of Labor has certified that the California statute is in compliance with the Social Security Act.

Even though the lower court found the six or seven week delay in this case violative of due process, it should not have

declared the California statute void in its entirety. While the question of what is a reasonable delay may be a matter of degree, surely if the state could, let us say, halve the waiting period, the delay would incontestably fall well within due process boundaries. The lower court could and should have drawn a guideline which would have saved the statute. It is a legal maxim that a court should not declare a statute totally void when it is void, if at all, only in application.

I. The California Procedures Are Not Inconsistent with the Social Security Act.

A. PAYMENTS ARE MADE "WHEN DUE".

The Social Security Act, 42 U.S.C., § 503(a)(1), provides that for the Secretary of Labor to find the state law consistent with federal standards, the state statute must be "reasonably calculated to insure full payment . . . when due". Unfortunately, there is scant legislative history concerning what Congress meant when it used the words "when due". Nevertheless, from the material available it appears that California Unemployment Insurance Code section 1335 is in harmony with the federal requirement that payments be made "when due". The California law is based on a recommendation made by federal authorities in 1935. Because the concept and mechanics of unemployment insurance were so complex the task of drafting a proposed federal law was entrusted to a Presidential Committee on Economic Security.[1] While the Social Security Act was under consideration by Congress in 1935, this Committee presented to Congress and circulated to the states two alternative statutes which would serve as models for state

1. See E. Witte, *The Development of the Social Security Act* (1962).

laws. Both model statutes provided for procedures identical to California Unemployment Insurance Code section 1335. See Hearings on S. 1130 Before the Senate Committee on Finance, 74th Cong., 1st Sess. at 602, 623 (1935). It is therefore apparent that the state procedures under examination here were before the Congress and considered by it and by the President's committee. It is ludicrous to believe Congress would acquiesce to the circulation of a model bill if it contained provisions inconsistent with a law (the Social Security Act) which Congress itself was considering at the same time. Indeed, the law Congress enacted for the District of Columbia not only provides for suspension of benefits after an appeal is filed, but even for a suspension while the time for appeal is running. D.C. Code §§ 46-311(b).

Section 1335 is supported not only by the history recited above, but also by common sense and by the commonly accepted meaning of the words "when due". Payments are "due" when they may properly be said to be "owing", *People v. Buckles,* 57 Cal.App.2d 76, 79 (1943), or, in other words, when the obligation has matured or become fixed.[2] *Feeser v. Feeser,* 93 Md. 716, 50 A. 406 (1901); *Cf. Joyce v. Scott,* 265 F.2d 369, 371-372 (1959); See also *In re Ingersoll Co.,* 148 F.2d 282, 284 (1945). While no universal rule

2. In California, following an initial determination favorable to a claimant, the state does commence payment immediately. However, if the employer appeals within the allowable ten day period, such payments are halted; in most cases the claimant has received one or two payments. The fact that the state has commenced payment following the initial determination should not be misconstrued. It is by no means a judgment by the state that the money is "owing" at that point or is legally due. It simply represents a recognition by the state that the employer probably will not appeal and there is little risk in proceeding to pay the claimant immediately. The soundness of this judgment is borne out by the fact that in 1968, for example, employers filed appeals in only two per cent (2%) of those cases where an initial determination was made favorable to the applicant. (A. 72, 74.)

may be formulated as to when an obligation is fixed appellants submit that in the context of unemployment insurance the Legislature has spoken, declaring that this point is reached only after an employer's appeal has been heard and resolved. This legislative judgment makes good sense. When an employer appeals, there is a sufficient cloud on the initial determination as to warrant withholding benefits until the appeal is decided. By contrast, at a later point in the proceedings, if the referee affirms the initial determination, the claimant's ultimate success is deemed sufficiently probable as to justify commencement and continuation of payments irrespective of further appeals. Cal.Unemp.Ins. Code § 1335(b).[3]

The legislative judgment is also sensible from an administrative law standpoint. Although the lower court considered the initial determination by a claims interviewer as virtually binding (A. 137), it is far more logical to ascribe relative finality to the referee's decision rather than the interviewer's. As one commentator stated,

> "[The appeals authorities] perform the usual explicit function of redressing injustices or correcting errors made at the lower levels of administration where action is typically more hurried and personnel presumably less competent." J. Becker, *The Problem of Abuse in Unemployment Benefits*, 99-100 (1953).

Nor does due process dictate that payments are due following an initial determination. Obviously, claimants would

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3. It is by no means certain that the Constitution compels payments to be made even at this point. *Cf. Pennsylvania Chamber of Commerce v. Torquato*, 386 Pa. 306, 125 A.2d 755, 757 (1956); *cert. denied*, 352 U.S. 1024; *Chrysler Corp. v. Appeals Board of Michigan Unemployment Comp. Commission*, 301 Mich. 351, 3 N.W.2d 302 (1942); *State ex rel. Campbell v. State*, 223 Ind. 59, 57 N.E.2d 433 (1944); *Dallas Fuel Co. v. Horne*, 230 Iowa 1148, 300 N.W. 303 (1941).

prefer the extreme sought by the plaintiffs here, i.e., that benefits be due and payable immediately. On the other hand, employers would prefer that benefits be withheld so long as the decision to pay is under appeal at any level, including the appeals through the courts. In balancing these conflicting demands, the Legislature has struck a compromise, suspending benefits only through one level of review or until the first appellate level decides in the claimant's favor. See *Abelleria v. District Court of Appeal,* 17 C.2d 280, 298 (1941).

In light of the fact that section 1335 is, in effect, a legislative pronouncement as to when payments are due and because that pronouncement has a sound basis, it is unreasonable to contend that the obligation is "fixed" after the initial determination by a claims interviewer.

In any event, it is surprising that the lower court would presume to rule that the California procedure is out of conformity with the Social Security Act. The fact is that the Secretary of Labor has already certified that the California procedure is in conformity with the Act. His finding is entitled to great weight, *cf. Rosado v. Wyman,* 397 U.S. 397, 406-407, 415 (1970), and is not judicially reviewable. See *Arizona v. Hobby,* 221 F.2d 498 (D.C. Cir. 1954); *Isbrandtsen Co. v. Federal Maritime Board,* 159 F.Supp. 884 (D.C. Cir. 1958); *Ragan v. Madigan,* 194 F.Supp. 19, 20 (N.D. Cal. 1961).

B. THE DELAY INCIDENT TO APPEAL DOES NOT FRUSTRATE THE CONGRESSIONAL PURPOSE.

The purpose of the federal statute was to provide unemployment insurance benefits to tide workers over a period of involuntary unemployment. S.Rep. No. 628, 74th Cong., 1st Sess. 10-13 (1935). California has effectuated that purpose in sensational fashion: In 98 per cent (98%) of the

cases prompt payments are made to claimants initially determined eligible.

But Congress did not expect the impossible.[4] Note that the statute requires the state program only to be "reasonably calculated" to insure full payment when due. Congress was aware that in terms of administration it might well be impossible to implement that purpose in *every single case*. For example, benefits may generally be obtained only for a maximum of 26 weeks. Clearly, the claimant who is unemployed for a period beyond 26 weeks does not have money to "tide him over a period of involuntary unemployment". In this common situation, the congressional purpose is not being implemented, but no contention is made that this benefits limitation is invalid. Secondly, the framers must have realized that in a small percentage of cases more than the usual delay would be unavoidable. This is reflected by the fact that the model Act which Congress had before it, itself provided for suspension of payments pending appeals. See p. 8, *supra*.

II. Section 1335 of the California Unemployment Insurance Code Does Not Violate Due Process.

In simple terms, the central issue here is whether the employer's right to be heard before his property is taken is outweighed by the prejudice to a claimant resulting from a six-week delay while the employer's appeal is pending.[5] It is submitted that in resolving the due process issues

4. "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least make the evil less." Holmes, J., dissenting, *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 115 (1928).

5. In a sense it is misleading to characterize the employer's opportunity to be heard as an "appeal". Generally, an appeal implies that at an earlier time both parties to a controversy have had a full opportunity to present their respective cases and one

posed by this question, the Court should apply the durable criteria it has reiterated with rhythmic regularity at least since 1951, when Justice Frankfurter commented in *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (concurring opinion):

> "Due process cannot be imprisoned within the treacherous limits of any formula." 341 U.S. at 162.
> ". . . what is unfair in one situation may be fair in another. [Citations.]." 341 U.S. at 163.
> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reason for doing it, the available alternatives to the procedure that was followed, . . . the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." 341 U.S. at 163.

Following this statement Justice Frankfurter went on to analyze the facts in the case before him in terms of the criteria he had enunciated. The same approach is appropriate here.

The interests in this case are:

1. *Interest of the employee.* Quite simply, his main concern is to obtain maximum benefits as soon as possible for as long as possible.

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party, displeased with the result, seeks to have a higher tribunal redress the purported errors of the lower court. The procedure here does not fit this definition. Since the "appeal" is essentially the employer's first chance to present his case, it would be more accurate to characterize it as a "Request to be Heard". The Oregon statute, for example, provides:

> "Unless the claimant or one of the employing units entitled to be so notified, within 10 days after delivery of such initial determination . . . files with the administrator a request for hearing upon the initial or amended determination, such initial or amended determination shall be final and benefits shall be paid or denied in accordance therewith." Ore. Rev. Stat. § 657, 765(2). See also Burns Ind. Stat. Ann. 552-154(2)(a) (Com.Supp. 1968); Mass. Gen. Laws c. 151A, § 39; Ohio Rev. Code § 4141.28(G).

2. *Interest of the employer.* The employer has a direct financial interest in every claim filed by an employee for it is the employer's money which is used to pay the claimant. Generally, each time an employer's former employee is paid benefits, the employer's reserve account is charged and his experience rating is adversely affected. Even if the employer's account is not charged the unemployment insurance fund may become so depleted that the employer will be compelled to pay into the fund at a higher rate. Cal. Unemp.Ins. Code §§ 976.5, 977, 978. (See A. 50-52.) Thus the employer is interested in assuring that only claimants who are fully qualified receive benefits.

3. *Interest of the State.* The state acts more as a trustee than as an interested party. Since the unemployment insurance program is funded exclusively by employers and not by general tax revenues, the state has no direct fiscal interest and is neither an advocate for the claimant nor one for the employer. The state's obligation is merely to administer the program fairly and in conformity with state and federal statutes.

In 98% of the cases all three of the described interests are harmonized; claimants are paid promptly and no appeal by an employer is filed. The problem arises in the remaining 2% of the cases, of which the instant one is an example.

This brings us to the second of Justice Frankfurter's suggested criteria, viz., the manner in which the subject interest is adversely affected. This can best be understood in light of the factual setting in cases such as the instant one:

A claimant appears at the unemployment insurance office and applies for benefits. He is asked to fill out a number of forms and is told to return while the Department processes the application and verifies the information. After interviewing the claimant, the Department makes a pre-

liminary determination that the claimant is or is not eligible. If he is ruled eligible, the Department generally feels safe in commencing payments almost immediately since, statistically, it is unlikely that the employer will appeal. At this point, the Department also sends out a notice to the employer informing him that the claimant has been found eligible and that the employer may appeal within 10 days.

If the employer does in fact appeal, a hearing is scheduled at which both parties may appear and be represented and payments are suspended while the appeal is pending.[6] In most instances, the claimant has only received one or two payments during the 10 day appeal period. (A. 114-115.)

The referee then issues his decision. If the decision is in favor of the claimant, payments to the claimant commence immediately, irrespective of any further appeals by the employer. Cal.Unemp. Ins. Code § 1335(b).[7]

The aspect of this procedure which gave rise to the instant lawsuit is the fact that, generally, processing of the employer's appeal takes between six and seven weeks.[8]

It is understandable that a claimant would be upset at a six-week delay. But his situation is not demonstrably different from the victorious plaintiff in a tort suit who must weather lengthy appeals before he gets his money, or the taxpayer who pays first and then seeks a refund, or the businessman who waits anxiously for action on a license or zoning application. The point is that there is a price to be paid for living in an ordered society. "No law can be made that does not take something from liberty." J. Bentham, *Anarchical Fallacies: Preamble.* See 2 Works (1843 Bow-

6. This procedure is in effect in most jurisdictions. For statutes see A. 69-70.

7. The entire claims procedure is set forth in some detail at A. 129-132.

8. In 1968 the period was 49 days. (A. 106.) In 1969 the period was 40.5 days. (A. 104.)

ring ed.) 493. Adjustments of an individual's rights, obligations, and privileges cannot be made with computer-like swiftness and precision. Time is an unavoidable ingredient in the decision-making process. Delay, cost, inconvenience—all are inescapable incidents of living in a society predicated on orderly procedures.

Mindful that some delay will inevitably be encountered, is the delay in this case unreasonably long? It is submitted that the six or seven weeks involved here, a delay confined to a tiny percentage of all unemployment insurance cases, is not unreasonable. There are 71 field referees in California and they handle 38,319 appeals in benefit cases each year.[9] Appeals take time. Hearings must be scheduled at a time convenient to the parties who must be given a reasonable period within which to prepare their case. The matter must be heard and transcribed upon request; the referee must review the evidence and draft and distribute a decision. To accomplish all this within six or seven weeks is a considerable achievement, especially when compared to the 22 month wait for a jury trial in a typical California urban county, (A. 62) or the four month delay which was present in the *Goldberg* case.

What are the consequences to the employer if the delay is eliminated? The court below ordered that the state either grant an immediate hearing the moment an employer appeals so that the claimant does not miss a payment, or that the state pay benefits while the appeal is pending. The former suggestion is unrealistic from a technical standpoint. The latter, however, deserves closer scrutiny in terms of the effect making such payments will have on the employer.

First, should the employer prevail on the appeal, the money that the claimant has received during the pendency

9. Figures are for 1969.

of the appeal is essentially unrecoverable.[10] Second, since a substantial portion of the money expended cannot be recovered, it is apparent that the unemployment insurance fund will require replenishment. This is done, not by the state, but by employers who are responsible for maintaining the fund at a prescribed level. See §§ 930, 977, 978 Cal. Unemp.Ins. Code and A. 50-52. See Exhibits B-E, appended to Motion of Southern California Edison Company, et al., to Intervene in this proceeding. Thus the employer's property is being taken before he has had a meaningful opportunity to be heard.[11] By contrast, the claimant has enjoyed an overwhelming advantage up to this point.[12]

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10. Throughout this lawsuit the claimants have sought to establish that payments to claimants pending employer appeals result in no prejudice to employers since the state can recover the overpayments. This is untrue. First, although recoupment procedures are available in some cases, Cal.Unemp.Ins. Code § 1379, they may not be used in the absence of fraud or misrepresentation by a claimant, where recoupment would be against equity and good conscience. Cal.Unemp.Ins. Code § 1375. No contention was made that Mrs. Java was guilty of fraud and she herself admitted that she had been told the state would not attempt to recover overpayments from her. See Mrs. Java's deposition, 29:10-11. But even if the state had valid grounds for seeking recoupment in cases of this type, the effort is of only marginal value. Claimants die, move to other states, go bankrupt. Presently, in over one-third of the cases the state is unable to recoup a penny. Jurisdictional Statement, App. C, p. 15. If the lower court's decision is permitted to stand, its ramifications will cause the fund to lose almost $18,000,000 a year. *Ibid.*, p. 17. In any event, the resulting pressure on the Fund may well cause a tightening up of recoupment statutes. *Cf. Graham, Public Assistance: The Right To Receive; The Obligation To Repay*, 43 N.Y.U. L.Rev. 451, 487 (1968).

11. Justice Harlan, concurring in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969), said, "I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity . . . of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." See also *District Unemp.Comp. Bd. v. Hahn & Co., Inc.*, 399 F.2d 987 (D.C. Cir. 1968); *Babb v. Bullitt*, 310 Ky. 211, 220 S.W.2d 394 (1949).

12. At the initial interview, generally only the claimant is present; he presents his version of the facts and may bring wit-

Summing up, we have a situation where 98% of all claimants are serviced promptly. In these cases, employers do not challenge claimants.[12] For the few claimants who face employer appeals, there is a delay which is of modest duration and which permits an employer to have his infrequent appeal heard before his purse is affected.

In terms of Justice Frankfurter's criteria—especially that which requires a balancing of hurt against good—it does not seem too much to ask that on those few occasions when an employer has legitimate doubt about the initial determination, he be given a chance to present his case. As Professor Davis has stated,

> "The true principle is that a party who has a sufficient interest or right at stake in a determination of

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nesses and documents to support his claim. The employer does not appear for two reasons: (1) having had no prior notice of the interview, it would be impossible for him to marshall documents and witnesses, leave the business unattended, and rush off to a hearing, and (2) 98% of the time he is unlikely to contest the initial determination anyway. Following the determination, the employer is informed of the decision and may then appeal. Until this point, only the claimant has had a full opportunity to present his case; as a practical matter, the employer has not had an effective opportunity to be heard until the matter is placed before a referee. The absence of the employer at the initial interview is of considerable benefit to the claimant. See S. Becker, *op. cit.*, p. 100.

13. The facts indicate that employers do not file frivolous appeals. They appeal only in about 2% of the cases. Approximately 47% of the appeals are decided in favor of the employer. (A. 59-60.) For graphic specific illustrations of this principle, see Exhibits B-E, appended to Motion of Southern California Edison Co., et al. to Intervene as Defendants-Appellants before this Court. Ironically, the decision of the court below would actually encourage frivolous appeals although the villain would be the employee and not the employer. By appealing, the employee would be able to stretch out his benefits irrespective of the merits of his appeal. *Cf. Comments, The Constitutional Minimum for the Termination of Welfare Benefits: The Need For and Requirements of a Prior Hearing,* 68 Mich. L.Rev. 112, 138-139 (1969).

> governmental action, should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination and argument, unfavorable evidence of adjudicative facts. . . ." 1 K. Davis, Administrative Law Treatise, 412 (1958).

See also *Baldwin v. Hale*, 68 U.S. (1 Wall.) 233 (1863); *Anderson Natl. Bank v. Luckett*, 322 U.S. 233, 246 (1944); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

III. The Principles of Goldberg v. Kelly, 397 U.S. 254 (1970) Do Not Apply to Unemployment Insurance.

A. THE FACTS OF GOLDBERG ARE DISTINGUISHABLE FROM THOSE HERE.

In the *Goldberg* case once the initial decision concerning eligibility was made by the welfare department, that decision was final and was immediately implemented. The recipient was put on the welfare rolls and paid with periodic regularity. After benefits had been paid for some time, however, the welfare department decided to terminate payments on the basis of an unchallenged and apparently unsubstantiated recommendation made by a caseworker. Although the recipients were given notice that the department proposed to terminate benefits, they were not given an opportunity to confront the caseworker or anyone else who may have supplied damaging information. See 397 U.S. at 259. They were limited to objecting in writing, a privilege not only less effective than confrontation and cross-examination, but often valueless to many recipients whose education is limited and who enjoy only borderline literacy.

The case here is quite different. In *Goldberg* the question of basic eligibility was closed and the focus was on subsequent termination. Here the question of basic eligibility is still open. The focus is on a point earlier in the pro-

cedural continuum; we are still at the first stage, and the question of subsequent termination is never reached. This distinction makes a difference. It is one thing for a court to rule, as it did in *Goldberg,* that a recipient, once found eligible, cannot be terminated without a prior hearing. It is quite another to say that a claimant is entitled to payment *before* his eligibility has been established.

If we analogize to other areas of law, we might say that in unemployment insurance cases the initial determination of eligibility by the state is, in effect, subject to a condition subsequent. If the employer does not appeal during the 10-day period, the claimant's right "vests", so to speak.[14] If the employer does appeal, the initial determination cannot be deemed complete until that appeal is decided.

A further ground for distinguishing welfare cases from unemployment insurance cases lies in the method by which the two programs are funded. In the welfare situation, benefits are paid out of general tax revenues. Unemployment insurance programs, however, operate differently from welfare programs. First, an application for unemployment insurance benefits involves not only the claimant and the state but the private employers who fund the program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) which is required to make contributions

14. This does not mean that the claimant will automatically qualify each week for benefits. The so-called "vesting" amounts only to a determination that a claimant had sufficient wages in his base period, that he did not leave work voluntarily, and that he was not fired for misconduct. While these matters, then, are foreclosed from further examination, when the claimant returns each week for benefits he will still be required to meet other criteria which are applicable to his weekly claim. For example, he will be asked to show that he was available for work during the prior week, that he did not refuse a valid job offer, etc. Cal.Unemp.Ins. Code § 1253.

into a reserve fund to pay benefits. Because of this method of funding the program, the state does not have the same direct interest it has in the welfare situation where every dollar the state saves may be available for other programs which compete for state funds. In the unemployment insurance area the state is basically neutral since it cannot use the unemployment insurance fund for other state purposes, but must simply insure that sufficient money is available in the fund to pay eligible claimants. The state, then, may be looked upon as a fiduciary in administering the unemployment insurance fund. The real parties in interest are the employers who will be required to pay more into the fund if plaintiffs' position here is adopted. The injection of this private interest introduces an element in this case which was not present in *Goldberg*. The importance of this element is that here we are concerned with due process for two parties—claimants and employers—whereas in the welfare situation the concern was solely that the claimant would receive due process.[15]

B. NEED IS THE BASIS FOR WELFARE ELIGIBILITY BUT NOT FOR UNEMPLOYMENT INSURANCE.

In the clamor produced today by numerous frontal attacks on public assistance and social insurance programs, it is important to consider due process in its proper perspective. Due process is not a concept which is the exclusive

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15. The first sentence of the majority opinion in *Goldberg* demonstrates this concern:

> "The question for decision is whether a State which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination *denies the recipient procedural due process* in violation of the Due Process Clause of the Fourteenth Amendment." 397 U.S. 255. (Emphasis added.)

province of the welfare claimant, the injured workmen, or the applicant for unemployment insurance benefits. While available to persons in these classes, it is equally available to the wealthy, to professional persons, to vast corporate entities, to small entrepreneurs, and the like.[16] In short, due process knows no social or economic distinctions. For this reason, sententious appeals to sympathy and dramatic portraits of dire economic circumstances serve only to cloud the issue. This is not to say that economic circumstances are totally irrelevant. But where they are germane, they constitute but one factor which goes into balancing the due process equation.

In *Goldberg* this factor outweighed most others. Need, after all, is at the very core of public assistance. Welfare is given only to those who are destitute, bereft of savings, earned income, or other sources of funds. For this reason the lower court's repeated references to the plaintiffs' "brutal need" in *Goldberg* were entirely relevant and no doubt partially dispositive. See *Kelly v. Wyman*, 294 F.Supp. 893, 900 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).[17]

In contrast to hoary welfare laws which date back at least to the Elizabethan Poor Laws, unemployment insurance is of fairly recent vintage and was designed to meet a wholly different problem.[18] The qualified unemployed

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16. "The Constitution of the United States is a law for rulers and people . . . and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 4 Wall. 2, 120; 18 L.ed. 281, 295 (1866, U.S.).

17. The nightmarish, almost unbelievable, living conditions suffered by the plaintiffs in *Goldberg* are documented by the District Court at 294 F.Supp. 899-900.

18. Although the concept of unemployment insurance had received desultory consideration near the turn of the century, the real impetus for legislation was the Depression. The distinction

worker receives unemployment insurance irrespective of whether he can draw upon savings or whether he receives income from property or relatives. Indeed, it is this absence of a means test which makes unemployment insurance preferable to relief. H. R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).

The irony is that the greater an employee's need the less unemployment insurance he is likely to receive. The amount of weekly benefits a worker receives varies proportionately with his wages in a four-quater period and the quarter in which he receives his highest wages. Cal.Unemp.Ins.Code §§ 1275, 1280 and 1281. The higher his wages the higher the weekly benefit and the total maximum benefits he receives. Thus those who have more need receive lower, not higher benefits. Moreover, a worker who has earned less than $720 in the four quarters of his base period is not entitled to any benefits whatsoever. Cal.Unemp.Ins. Code §§ 1275 and 1281. Consequently, the worker who may be most in need of unemployment insurance has no entitlement to benefits.

Thus the "crucial factor" of need (397 U.S. at 264) which was dispositive in *Goldberg* cannot have the same impact in deciding the question of due process in unemployment

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between welfare and unemployment insurance was recognized from the beginning. In 1931, Franklin D. Roosevelt, then Governor of New York, sent his Labor Commissioner, Frances Perkins, to Great Britain to study the British system of unemployment insurance. She discovered the British had confused poor relief with insurance, that they had disregarded actuarial principles, and that coverage was often expanded without regard for contributions. She cautioned against these errors and advised that any unemployment insurance program considered in this country should be based on a principle of limited payments with the retention of benefits to reserves in accordance with insurance principles. See D. Nelson, *Unemployment Insurance, The American Experience, 1915-1935*, 167 (1969).

insurance cases.[19] While we cannot ignore the fact that some unemployment insurance claimants are in fact needy,[20] we must recognize that unemployment insurance is available to rich and poor alike and hence it is illogical to permit the right to benefits to be accelerated in direct relation to the severity of a claimant's economic situation.

The difference between welfare and unemployment insurance with respect to need was pointed out by a noted authority who stated,

> ". . . public assistance programs provide benefits according to individual and demonstrated budgetary needs and are usually financed from so-called general revenues, i.e., tax impositions of the direct or excise type without particular connection between the class of taxpayers or transactions bearing the burden and the class of recipients benefited by the program. Social insurance, on the other hand, is characterized by benefits which are payable without proof of need and is usually financed, at least in part, by either the prospective beneficiaries themselves or a class of taxpayers upon whom these beneficiaries are economically dependent or both. . . ." Riesenfeld, *The Place of Unemployment*

19. This Court itself observed that the exigencies of welfare distinguish it from other programs. At 397 U.S. 262, the majority declared that constitutional restraints apply equally to welfare and to "disqualification for unemployment compensation [citation]; or to denial of a tax exemption [citation]; or to discharge from public employment [citation]." But two pages later the Court noted that because of the need concept, special considerations apply to welfare, dictating a result which could well be different from that applicable to the other examples mentioned by the Court. At page 264 the Court specifically noted that this "crucial factor" (need) was "not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption *or virtually anyone else whose governmental largesse is ended.*" (Emphasis added.)

20. They are not all as needy as the claimants here would have us believe. In 1968, for example, 43% of the eligible claimants received the maximum weekly benefit amount. The average earnings of such claimants was $8,329 annually.

Insurance Within the Patterns and Policies of Protection Against Wage Loss, 8 Vand.L. Rev. 218, 223 (1955).

The distinction is of considerable importance since a delay of payments in a program predicated primarily on need may be intolerable while less protracted delays under other programs where need is not strictly relevant may be within constitutional limits. *Cf. Dandridge v. Williams,* 397 U.S. 471, 522 (1970) (dissenting opinion).

IV. A Court Should Save the Constitutionality of a Statute Whenever Possible.

A cardinal principle of statutory construction is that a statute should be saved whenever possible and not destroyed. *Labor Board v. Jones and Laughlin,* 301 U.S. 1, 30 (1937); *United States v. Menasche,* 348 U.S. 528, 538 (1955); *Epstein v. Helvering,* 120 F.2d 427 (1941). As the United States Supreme Court has stated, "It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose." *Communications Association v. Douds,* 339 U.S. 382, 407 (1950); See also *Antilles Surveys, Inc. v. DeJongh,* 358 F.2d 787; *cert. denied,* 385 U.S. 900 (1966); See generally 16 C.J.S., Constitutional Law, §§ 92-101.

In the instant case, plaintiffs' real objection is that the withholding of payments pending an employer appeal results in an inordinate delay and that the claimant, even if eventually victorious, nevertheless must wait for payment for an unreasonable length of time. What is reasonable or unreasonable, of course, depends on the circumstances of each case. In the *Goldberg* case, for example, the delay occasioned by the withholding of payments was some four months and the court concluded that a delay of this length

was unreasonable. In the instant case, however, the delay is on the average approximately six or seven weeks, a delay which is not unreasonable in light of the problems of administering a program of this magnitude. The law is in the business of drawing lines, of deciding what specific procedures fall above or below "the Plimsoll line of due process",[21] and the court below could easily have framed a guideline for the Department indicating that a lesser delay in this case would be acceptable. The court's duty in this respect is underscored by the fact that most other states have a statute similar to section 1335 and the ruling in the instant case will indubitably encourage similar attacks on statutes across the nation. Under such circumstances, it is urged that a court should be particularly reluctant to rule that a state statute is unconstitutional.

CONCLUSION

For the reasons stated, the decision of the District Court should be reversed.

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Respectfully submitted,

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21. Frankfurter, J., *Fikes v. Alabama*, 352 U.S. 191, 199 (1957).

[illegible]. State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b) of Title 26), immediately upon such receipt, to the Secretary of the Treasury to the credit of the employment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of

unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b) of Title 26: *Provided,* That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further,* That the amounts specified by section 1103(c) (2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to

section 502 of this title, which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor for the proper administration of such State law.

(b) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided,* That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisdiction under such State law: *Provided further,* That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law—

(1) That such State does not make its records available to the Railroad Retirement Board, and furnish to

the Railroad Retirement Board at the expense of the Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes; or

(2) That such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

Aug. 14, 1935, c. 531, Title III, § 303, 49 Stat. 626; June 25, 1938, c. 680, § 13(g), 52 Stat. 1112; June 20, 1939, c. 227, § 18, 53 Stat. 848; Aug. 10, 1939, c. 666, Title III, § 302, 53 Stat. 1378; 1946 Reorg.Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 10, 1946, c. 951, Title IV, § 416(c), 60 Stat. 991; 1949 Reorg.Plan No. 2, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; Aug. 28, 1950, c. 809, Title IV, § 405(b), 64 Stat. 560; Aug. 5, 1954, c. 657, § 5(a) (1), 68 Stat. 673.

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DEC 9 1970

E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term 1970

No. 597

Jerome Joy, et al.,

Appellants,

vs.

City of St. Louis, Missouri, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Missouri

BRIEF OF THE STATE OF IDAHO AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM 1970

No. 507

JUDITH JAVA, et al.,
Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants.

On Appeal From the United States District Court
For the Northern District of California

BRIEF OF THE STATE OF IDAHO AS AMICUS CURIAE

INTEREST OF AMICUS

On May 14, 1970, the United States District Court for the Northern District of California in the case of *Judith Java, et al, vs. California Department of Human Resources Development, et al,* Case No. C-69 350 ACW, entered its interlocutory judgment preliminarily enjoining the defendants from enforcing that part of California Unemployment Insurance Code Section 1335 which provides that "(i)f an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision." The Court further ordered the

defendants not to suspend unemployment benefits due plaintiffs and members of their class on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The rationale of the Court was to the effect that the facts in the *Java* case were indistinguishable from those of the *Goldberg* case and that when this fact is considered, together with the "payment when due" directive of Section 503 (a)(1) of Title 42, U.S.C., the Social Security Act of 1935, as amended, which, according to the Court, was an indication of legislative intent to aid the unemployed when they need it most and was also a "reiteration of the classic due process standard, i.e. when a person has been found entitled to a government benefit, this benefit in most cases cannot be taken away without certain pre-termination procedures being followed," the inevitable result is that the procedure employed by defendants violates both the Federal statute and the Constitution.

Pursuant to the authority conferred upon it by Section 72-1368 (j), Idaho Code, and by Regulations adopted by the Executive Director of the Department of Employment pursuant to the authority conferred upon him by Section 72-1333 (b), Idaho Code, and more particularly Regulations, Article III, paragraph 5, *amicus* applies its Employment Security Law substantially as do the defendants in the *Java* case. *Amicus* asserts that these procedures do not violate either the Due Process Clause of the Fourteenth Amendment or the applicable provisions of the Social Security Act. If this Court is to affirm the decision rendered by the District Court below, said decision would by innuendo require *amicus* to reinterpret and apply its law in accordance with the decision in said case and *amicus*

believes said interpretation would be contrary to law and contrary to the best interest of all parties concerned. *Amicus* therefore respectfully petitions this Court to reverse said District Court decision.

SUMMARY OF ARGUMENT

The District Court incorrectly interpreted the *Goldberg* case as proclaiming that due process in unemployment insurance cases prohibits the state, once it has in any way ruled claimants eligible for unemployment insurance benefits, from terminating said benefits before granting to the claimant a pre-termination evidentiary hearing. The Court erred because it ruled that due process compelled this decision when the Court weighed and balanced the state's interest in protecting public funds against the interest of the disaster-stricken claimant in having the necessities of life while the bureaucracy mulls over his continued eligibility. Actually, what the Constitution provides is that no state shall deprive a person of his property without due process of law. The proper question to ask therefore is whether the process by which the state takes a person's constitutionally protected property amounts to "due process." The questions to be asked in an unemployment insurance case then are: (1) Are unemployment insurance benefits the property of claimant as contemplated by the Fourteenth Amendment? (2) If so, when do they become constitutionally protected property? (3) And finally, if they are constitutional property, was claimant deprived of said property without due process of law, i.e., without the opportunity to be heard at a meaningful time and in a meaningful manner, in a hearing tailored to the capacities and circumstances of those who are to be heard, and during which he was allowed to confront and cross-examine adverse witnesses, with the aid of counsel if he so desired, and a decision at the end of such hearing as

to claimant's eligibility for unemployment compensation which rested solely on the legal rules and evidence adduced at the hearing, all of which occurred before the state finally deprived him of his property?

The conclusion reached by the District Court that the payment of unemployment insurance is indistinguishable from the payment of public welfare as in the *Goldberg* case is contrary to both the law and the facts. Whereas the need of the claimant is the sine qua non of welfare entitlement, it was expressly rejected as one of the eligibility conditions of unemployment insurance, thus making available to the eligible, whether rich or poor, needy or not, the benefits of unemployment insurance. In fact, the longer a claimant was employed prior to his unemployment and the greater his income, the greater are his unemployment benefit payments and the longer do they last; the lower the income while working and the shorter the duration of said employment, hence, presumably the greater the need for benefits, the less does claimant actually receive, and all this is accomplished by express provisions of the Employment Security Law.

The Court below erred in asserting that the "payment when due" directive of the Social Security Act evinces a congressional intent to help the jobless when they need it most. It evinces an intent to pay them when they are entitled to it and not before. In fact, a claimant's most acute need is not normally when he first files for benefits, which is usually only a day or so after termination of employment when he still has money from his last pay check, but later on after he has exhausted said funds. However, in any event, need is not one of the conditions that makes unemployment benefits "due."

The Court in concluding that the "payment when due" provision constitutes a reiteration of "the classic due process

standard" that once a benefit claimant has been declared eligible for unemployment insurance payments, the benefits cannot be taken away or withheld without a pre-termination evidentiary hearing, erred not only as to when payment is due but more importantly as to what the classic due process standard really is.

The ruling below that once a claimant has been ruled eligible for benefits in an initial interview at which the interested employer or employers are not present and that if then the last employer or the chargeable employer, which are very often not the same employer, appeals the "determination" of eligibility, a procedure that suspends payment of benefits until the employer's appeal is heard and decided, deprives claimant of the due process guaranteed him by the Fourteenth Amendment and is not calculated to insure full payment of unemployment insurance benefits when due as required by Section 503 (a) (1) of Title 42, U.S.C., is in error.

ARGUMENT

I. In The Administration Of Unemployment Insurance By The States Procedural Due Process Does Not Require That A Pre-Termination Evidentiary Hearing Be Held Before Benefits Are Terminated.

A. ARE UNEMPLOYMENT INSURANCE BENEFITS PROPERTY AS CONTEMPLATED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

All of us are to a certain extent at least products of our time. We are a people caught up in a neoteristic love of change. Ours is a revolutionary time in which change is constant and

pervasive and any idea, principle, life style, program, institution or standard which is more than a few minutes old is suspect. We speak of the freedom and dignity of the individual while at the same time attributing all of man's problems to the forces produced by our industrialized-urbanized society and the bigness of government, all of which problems are therefore beyond the control of individual man. Only the collective can adequately deal with these problems which will largely be solved by the economic, political, social and educational leveling of society. Thus the solution seems to rest in a welfare state wherein the state assumes the primary responsibility for the economic and social welfare of its individual citizens. The welfare state is accomplished by taking from the haves and giving to the have nots. This is the constant theme of the arts, the news media and academe. It seems also to be the trend of judicial decisions throughout the nation.

Thus America's past is called into question and it is alleged that the prejudice and tradition of the past are all that stand in the way of achieving this as yet undefined secular social utopia envisioned by its advocates. Yet the people adopting the constitution had made it clear that they did not believe that the source of rights or privileges was either the government or the constitution, but that they were inherent in and an inalienable part of man. They had enumerated in the constitution the purposes for which government could act and consequently for which private property could be taken for a public purpose and then taken only according to due process of law. Those people had experienced unlimited government and chose to have it no longer. They recognized that if the government has the power to confer rights or property it has the power to take them away. This, they expressly denied to government and said further any property we possess you cannot take from us without due process of law.

There have been in the past strict constructions of even the due process clause and he courts have seen it necessary to reinterpret this constitutional limitation in light of changing conditions.[1] However, the very essence of constitutional government is tnat it recognizes that the source of all personal rights is not the government but rather they are inherent in the people who create the constitution. Thus the purpose of writing a constitution is to expressly limit the government it creates. An independent judiciary is charged with interpreting governmental action to see whether it complies with these limitations, and if the branch of government which limits all other branches is not limited itself, then it is meaningless to speak of a government as constitutional.

This Court has held that the fundamental purpose of constitutional construction is to give effect to the intent of the framers of the constitution and the people adopting it, *Whitman v. National Bank,* 176 U.S. 559, (1900), and that the courts are not at liberty to disregard the plain meaning of the words of a constitution in order to search for some other conjectured intent, *McPherson v. Blacker,* 146 U.S. 1 (1892), thus the words in a constitution are used according to their plain, natural and usual signification and import, *Wright v. United States,* 302 U.S. 583, (1938), and in interpreting the constitution the Court should not go against the literal meaning thereof, *Forbes Pioneer Boat Line vs. Board of Commissioners of Everglades Drainage District,* 258 U.S. 338, (1922). The same meaning and intent are ordinarily given to the due process guarantee in both the Fifth and Fourteenth Amendments, *Hibben v. Smith,* 191 U.S. 310 (1903). See *11 Am. Jur., Constitutional Law, Section 61.*

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1. *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L.R. 1439 (1968).

Recent decisions of this Court have established an economic needs test as the overpowering fact which controls in the question of whether procedural due process requires a pre-termination hearing before government largesse is suspended or discontinued or whether a post-termination hearing will suffice, which test so far has always been resolved against the government and in favor of those in "brutal need," asserting that to cut off such benefits in the face of such brutal need is to deprive the recipients of the very means of survival while the state labors to make a decision it has already resolved in favor of the recipient, and such action is unconscionable. The decisions thus say that even a temporary delay in turning said welfare benefits over to an eligible claimant violates due process. However, we are not given any guidelines as to how long the delay can be, if any at all, before it becomes unconscionable. These decisions offer as the only solution to the cases where such procedure results in improper payment of benefits that the people expend more funds to collect what was illegally paid or to improve and speed up procedures to prevent such incorrect payment. Thus, in addition to the requirement that the taxpayers have extracted from them the initial tax to pay the benefits in question, they are rewarded for their efforts by being asked to pay in more to recover payments which should never have been made in the first place, all in order to prevent a delay to those in need. This is, in effect, to tell Idaho that when it discovers a claimant who is receiving unemployment insurance benefits while on a skiing vacation in France that it must somehow notify the vacationing recipient of its intention to stop said payments and to give him a reasonable opportunity to appear and contest said termination prior to actual termination of benefits. Certainly, the Court would not say that the need was so "brutal" in such a case that the termination prior to a hearing was unconscionable.

Perhaps such results come about because we talk of government as though it provided all the money when, in fact, of course the people do. In our system, the government has no funds it generates on its own, it can give to some only after it has taken from others. It does not hurt us to remind ourselves on occasion that the government gets its income from the people and from the people only. If we let ourselves forget this truth and think of some governmental entity as the source, we can be led into error's gloomy way. The question is not resolved in terms of government vs. people, but only in terms of what one citizen has a right to demand from other citizens. The right of due process like any other right guaranteed by the constitution is not to be enjoyed without limitation or reference to the rights of others, *Hughes vs. Kansas City Motion Picture Machine Operators,* 282 Mo. 304 (1920), cert. denied, 254 U.S. 632; *Application of Stone,* 77 Wyo. 1 (1957), cert. denied, 352 U.S. 1026. Certainly, in unemployment insurance matters, the employer is an interested party and must be afforded the same due process rights as the claimant, *Juster Bros. vs. Christgau,* 214 Minn. 108, (1943).

Is it too much to assume that procedural due process is primarily concerned with the adequacy of the procedures involved in taking property and not the relative merits of conflicting claims? The needs of the parties involved may be a proper element of concern as to whether the procedure involved meets due process standards but that such need is to be determinative of the issue of pre-termination vs. post-termination hearings is to disregard the plain meaning of the words of a constitution in order to search for some other conjectured intent.

B. WHEN DO UNEMPLOYMENT BENEFITS BECOME THE PROPERTY OF CLAIMANT?

Whereas in the past there seems to have been considerable question as to whether government largesse is property as contemplated by the due process clause, the doubt allegedly has been removed for us today.[2] But if it is actually and irrevocably too late in the day to raise the objection that unemployment insurance, along with other government largesse, is not really constitutional property subject to the due process clause, perhaps it is not too late to ask the question: At what point does unemployment insurance become the property of a claimant? If one assumes that unemployment insurance is, in fact, property as contemplated by the due process clause of the Fourteenth Amendment, the Court below correctly concluded that the law is that said benefits become the property of claimant when due. But it incorrectly concluded that the benefits become due in the case of unemployment insurance when there is the initial finding made by the state that the claimant presumably is entitled to benefits based upon an interview at which claimant alone is present and at which time the claimant's version of the cause for his unemployment is given, but at which interview the employer is not present or given a chance to tell his version of the separation from employment or to confront or cross examine witnesses, or to rebut information given by the claimant.

The Social Security Act, Section 503 (a)(1), Title 42, U.S.C., requires that before the Secretary of Labor can find a state law to be consistent with Federal standards, the state statute must be "reasonably calculated to insure full payment... when due." Thus, the state laws presently in effect in the

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2. *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law,* ante.

country have been approved by the Secretary of Labor and said statutes include the provisions for pre-termination procedures such as those at issue herein. Model statutes prepared by a Presidential Commission at the time of the enactment of the Social Security Law proposed model statutes to be used by the states in drafting their laws. The hearings conducted by the Senate Committee on Finance reflect the fact that such model statutes included the language permitting the termination of benefits prior to hearing similar to those contained in the state laws which are at issue herein. See *Hearings on S. 1130 before the Senate Committee on Finance*, 74th Cong., 1st Sess. at 602, 603 (1935). These facts indicate that the Congress believed such termination procedures to be in harmony with the "payment when due" provisions of the Social Security Act.

Although there is no universally accepted definition of "when due," common sense tells us that "due" means that which is legal, proper, or according to law. See *Citizens National Trust and Savings Bank of Los Angeles vs. Brown*, 54 Cal. App. 2d 688 (1942).

The Court below alleges that the question of "when due" is resolved by balancing the need of the one claiming the benefits against the state's interest in protecting the Employment Security Fund. Actually, the decision misses the point that Employment Security Funds are not general revenue funds of the state, but are trust funds set aside exclusively for the payment of unemployment insurance benefits. The source of the funds is exclusively the employers of covered employment within a state and no general revenue funds are involved in paying benefits. In the State of Idaho, the amount the employer pays into the fund relates directly to his experience rating, that is, the ratio of benefits paid to the contributions the employer makes to the fund and the rate at which the

payments are made is related directly to the total balance in the Employment Security Fund. See Sections 72-1350 and 72-1351, Idaho Code. Thus, even in those cases where benefits are paid erroneously, since in most cases they cannot be recovered, the employer has a direct interest because the depletion of the fund results in his paying at a higher tax rate. This is a unique taxing situation and the state's interest therein is much more passive than in the normal taxing situation. If indeed we are to apply in these cases a weighing of interest test, then we should actually be weighing the claimant's interest against that of the employer. All state laws specifically recognize that the employer is an interested party in all proceedings effecting the paying of benefits for the amount he is required to pay in taxes is directly related to such expenditure of benefits.

It appears impossible to assert that unemployment insurance is an inherent inalienable right belonging to mankind. Certainly no such right was contemplated by the constitution or those adopting it. Any "right" one may claim to unemployment insurance, therefore, arises out of the statute creating such benefits. Recognizing the truth of this assertion, many law review articles today and other text books on unemployment insurance suggest that the constitution be amended to guarantee such rights as part of individual freedom and dignity. Unemployment insurance is based upon weekly eligibility for said benefits and is not based upon any continuing type of eligibility where once the claimant qualifies, he is forever qualified. Each week is considered a separate claim and the unemployed person must file each week for benefits and meet the eligibility requirements of the law. Therefore both the claim and the protest to the payment of claims are reasonably considered on a week-to-week basis and not in any continuum. Each time a claimant files for benefits he is filing a separate claim and must again meet the eligibility requirements.

When a claimant enters a claims office and files for benefits, the state normally takes his word concerning his eligibility, for in at least 95% of the cases the state receives accurate information and there is no protest from any employer involved. The alternative is either to pay the benefits when the claim is filed, presuming the information to be correct which it is in the vast majority of cases, or to refuse to pay any benefit claimant until the employer has had his due process of law. Certainly the latter procedure would do violence to the "when due" provisions of the Social Security Act. In the other cases where there is a protest and payments are temporarily suspended, the employer is simply allowed his opportunity to protect his property by putting in evidence to show disqualifying circumstances and, assuming that the claimant is successful in the hearing conducted as a result of the employer's protest, he is given all benefits to which he is entitled both past and future. Even though the employer prevails at the hearing he may still be required to pay at a higher tax rate in the future. The fact that the employer prevails in approximately 50% of the protests filed indicates that these protests are not frivolous but are substantial and that the right of the employers is in as much need of protection as that of the claimant. This Court has held in the past that the demands of due process do not require a hearing at the initial stage or, for that matter, at any particular stage in an administrative proceeding so long as the required hearing is held before the order becomes final depriving a person of his property. See *Opp Cotton Mills vs. The Administrator of Wage Hour Division,* 312 U.S. 126, (1941). There is nothing in the procedure employed by the states in the administration of their unemployment insurance laws that violates this due process standard. The lower court bases its argument totally upon the idea that there is such a brutal need in the claimant for such

benefits that to terminate them prior to a full evidentiary hearing is unconscionable. The due process standard should not be based upon need but upon there being held an adequate hearing before the claimant is finally, absolutely and irrevocably denied unemployment insurance. In no other manner can all interested parties receive due process. For a number of years now many decisions have been justified in the courts of this land on the basis that a dual standard has been applied regarding the opportunity of the rich and poor respectively to secure due process of law. It would indeed be a reversal of all that due process is supposed to stand for if we would now attempt to rectify what appeared to be a past evil by creating a new evil wherein the poor were automatically favored over the non-poor simply because of their economic situation.

Therefore, the proper conclusion is that benefits are due a claimant when he qualifies according to the eligibility requirements of the unemployment insurance law, and that prior to that time no property rights attach which can be invoked to require a pre-termination evidentiary hearing. See *United States vs. Northern Pacific Railroad Co.*, 256 U.S. 251, (1921). It is especially important to keep the idea in mind that in unemployment insurance not only is there a separability issue at the time of the termination of employment but there is also a continuing eligibility question which is raised on a week-to-week basis, and the eligibility issue is whether the claimant is, during each of the weeks for which he files for benefits, able, available and seeking suitable work, and that he has not failed to accept or to be referred to suitable work when directed to do so by the state. See Section 72-1366, Idaho Code. If the lower court's opinion prevails, then it would seem that benefits could not be denied pursuant to these eligibility conditions until the state had demonstrated that a claimant was not able, available and seeking suitable work in a pre-termination evidentiary hearing.

The procedures followed by the states in paying unemployment insurance benefits, including the temporary suspension of benefits while eligibility is determined, in no wise violate the directive of Section 503 (a)(1) of the Social Security Act which requires that payments be made when due, for that directive is simply an instruction to the states to determine eligibility for benefits and to pay them when eligibility has been established and not before, for it is only at that point that said benefits become due.

C. A PRE-TERMINATION HEARING IS NOT REQUIRED IN UNEMPLOYMENT INSURANCE ADMINISTRATION BECAUSE THE ELEMENT OF "BRUTAL NEED" IS NOT PRESENT.

Amicus assumes arguendo that the element of brutal need is not a necessary prerequisite to qualify for unemployment insurance. In *Goldberg v. Kelly,* supra, this Court quoted with approval the case of *Kelly v. Wyman,* 294 F. Supp. 893, 899, 900 (1968), which ruled that in the case of welfare benefits, the overpowering fact which controls is the "brutal need" of the destitute recipient and in light of this brutal need, to suspend payments without a pre-termination evidentiary hearing was unconscionable. This Court concluded that the interest of the government in protecting public tax revenues did not outweigh the requirement for a pre-termination hearing, as such a hearing was the only way to avoid condemning the recipient to suffer grievous loss. However, in the *Goldberg* case, this Court expressly recognized that some governmental benefits may be administratively terminated without a pre-termination evidentiary hearing.

Since we are assuming, for the moment at least, that the element of need is not an overpowering factor in unemployment insurance, the question must then be asked: Do the procedures employed for determining unemployment insurance eligibility meet the classic due process standards?

The elements involved in the classic due process concept are reiterated in the *Goldberg* case and are as follows: The fundamental requisite of due process of law is the opportunity to be heard; the hearing must be "at a meaningful time and in a meaningful manner;" the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard; where important questions of fact are to be resolved due process requires an opportunit to confront and cross examine adverse witnesses; if the right to be heard did not include the right to be heard by counsel, it would be meaningless; and finally, the decision itself must rest solely upon the legal rules and evidence adduced at the hearing, all of which must have occurred before the state finally deprives claimant of his property.

The procedures provided by the employment security laws of the various states meet each of the elements of due process listed immediately above. See, for example, Sections 72-1361 and 72-1368, Idaho Code. There is, of course, no allegation that the procedures themselves are not adequate under the classic due process standards enumerated in the cases cited above. The court below alleged without foundation or support in the cases that the classic due process standard is that when a person has been found to be entitled to a government benefit, this benefit in most cases cannot be taken away without pre-termination procedures being followed. In arriving at this decision the Court cited the *Goldberg* case. The procedures enacted by the states are in fact designed to test whether the claimant is entitled to benefits for, if he is not, then there is no question of being deprived of property without due process of law. Such decision can be arrived at only if the state has had the opportunity to fully and adequately hear all interested parties which include both the claimant and the employer.

II. The Principle Announced In Goldberg v. Kelly, 397 U.S. 254 (1970) Does Not Apply To Unemployment Insurance.

A. THE FACTS OF THE GOLDBERG CASE ARE DISTINGUISHABLE FROM THOSE INVOLVED IN UNEMPLOYMENT INSURANCE ADMINISTRATION.

The crucial, factual distinctions between welfare cases and unemployment insurance cases are, first of all, that we have a third party involved in unemployment insurance matters which is an interested party in all stages of the procedure and who has as much right to constitutional due process as does the claimant and, secondly, that the statutes themselves make clear the legislative intent that unemployment insurance benefits are not considered due until the employer has been heard, and this is true even though the unemployed claimant may have drawn some initial benefits, and finally, unemployment insurance is determined on a week-to-week basis where each weekly claim is considered a new claim and the claimant is required to meet all the personal eligibility requirements of the statute.

There is an additional element that must be considered in order to do justice to the concept of unemployment insurance. Such a program is designed to aid those who are involuntarily unemployed through no fault of their own. A careful reading of the various state laws reveals that the unemployed person is deemed entitled to benefits when it can be demonstrated that the employer has unjustifiably discharged the employee. It is also designed to cover the situation where the conditions in society are such as to cause a person's separation from employment. This is for all practical purposes to assert that said benefit entitlement is conditioned upon the guilt of the employer or to societal factors beyond the control of the unemployed. These factors indicate a burden being placed upon the claimant to establish the justice of his claim and it is impossible for any governmental agency to arrive at a fair

conclusion concerning these factors unless both sides of the story are fully developed. See *Burroughs v. Employment Security Agency*, 86 Idaho 412, 387 P.2d 473 (1963).

In Welfare payments, however, there is no third party involved in the determination, the funds involved are general tax revenues, need is the sine qua non, and there are not the strict weekly eligibility requirements as in unemployment insurance.

In order to fully appreciate the situation, one must recognize that in unemployment insurance, the state's interest is considerably different than in the welfare situation. The funds involved in unemployment insurance are derived exclusively from the employers involved in the program; and those funds are considered as a trust fund, they are not mingled with other general revenue funds and can be used only for payment of unemployment insurance benefits. Since the employer is required to pay the complete amount involved in the administration of unemployment insurance, and inasmuch as, in almost all jurisdictions the employer cannot pass these expenses on to the employee, certainly due process requires that a special effort be made to insure that only eligible claimants receive said benefits. An eligible benefit claimant is the one who meets all the eligibility requirements of the law. Statistically speaking, the state is justified in paying the claimants on the basis of the initial interview and a short delay in turning over benefits to eligible claimants, whose benefits have been temporarily suspended, is not unconscionable because the element of brutal need is most often not present in unemployment insurance cases.

B. WHEREAS, NEED IS THE SINE QUA NON OF WELFARE ELIGIBILITY, IT IS NOT EVEN A CONSIDERATION IN THE DETERMINATION TO PAY UNEMPLOYMENT INSURANCE BENEFITS.

In alleging that need is not the controlling factor in unemployment insurance administration, one is of course taking the unpopular side of the argument. It is much easier to take the humanitarian approach and argue that these benefits are necessary to provide the necessities of life. But such is simply not the case. The facts are that in most cases, at least in the State of Idaho, a person drawing benefits has more annual income than do those in the state who do not draw benefits.[3]

In fact, under the law, whether a claimant has an independent source of income, and whether a spouse may be working to help raise the standard of living for the family has no bearing on his ability to draw unemployment insurance. There is nothing in the law to prevent rich or poor alike from filing for and receiving unemployment insurance benefits.

That there are those filing for unemployment insurance who are destitute goes without saying. But that this Court should announce as a constitutional principle that need should be the overpowering factor in ordering the states to conduct pre-termination hearings before temporarily suspending benefits, while another interested party is granted due process would be to ignore the legitimate due process standards

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3. During the past fiscal year, the statistics compiled by the Department of Employment, State of Idaho, indicate that the average income during the base year of claimants was $6,647.68, whereas, the average income for all persons in covered employment in the state was only $5,997.68. In addition, the statistics reflect the fact that over one-third of those drawing benefits had worked for 49 or more weeks during their base year, and that more than two-thirds of the claimants had worked for 40 or more weeks during that period.

previously announced by the Court and the fact that need is generally not a significant factor in these cases. That such a holding may require the individual to plan ahead and provide some protection for himself and his family may not be the popular position, but certainly the constitution does not require that the state insure individual citizens against their own folly. It would be contrary to all that unemployment insurance has stood for to at this time interject the standard of need as a determining factor in the administration of such laws.

III. It Is Within The Power Of This Court And A Duty Imposed Upon It To Construe A Statute So As To Avoid The Danger Of Its Unconstitutionality.

The Supreme Court has it within its power and, in fact, has a duty to declare the state statutes at issue herein constitutional as such statutes do not violate the legislative purpose announced in Section 503 (a)(1) of the Social Security Act. See *Labor Board v. Jones and Laughlin,* 301 U.S. 1, 30 (1937), *Communications Association v. Doude,* 339 U.S. 382, 407 (1950).

Only recently this Court ruled that it was not a super-legislature designed for the purpose of passing on the moral and philosophical value of the views enunciated in a statute, but rather that it was a constitutional tribunal empowered to determine the constitutionality of the statute as administratively applied, *Dandridge v. Williams,* 397 U.S. 471, 480, 481 (1970). If the statutes in question, as applied, are deemed to be violative of the due process clause then the Court has a duty if at all possible to so construe the law and to provide the states with the guidelines in applying the law so as to make it constitutional. It would seem that such guidelines would

indicate what period of time unemployment benefits could be withheld while the state gathers additional information concerning the merits of the claim without violating claimant's due process.

CONCLUSION

For the reasons stated above, the decision of the District Court granting the relief prayed for by the plaintiffs therein should be reversed.

December 4, 1970.

Respectfully submitted,

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APPENDIX

72-1368. CLAIMS FOR BENEFITS AND APPELLATE PROCEDURE.—(a) ***

(b) ***
(c) ***
(d) ***
(e) ***
(f) ***
(g) ***
(h) ***
(i) ***

(j) Benefits shall be promptly paid in accordance with a determination or redetermination except that such benefits need not be paid prior to the expiration of the period for appeal if the record with respect to the claim indicates that ineligibility has been alleged or may exist. If pursuant to a determination or redetermination benefits are payable in any amount as to which there is no dispute, such amount of benefits shall be promptly paid regardless of any redetermination or appeal. If a determination or redetermination allowing benefits is affirmed in any amount by an appeals examiner, or is so affirmed by the board, or if a decision of the appeals examiner allowing benefits is affirmed in any amount by the board, such benefits shall be promptly paid regardless of any claim for review or further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by the board or any court but if such decision is finally reversed benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal.

***

ARTICLE III — BENEFIT REGULATIONS

5. VALID CLAIM. — A valid claim may be canceled at the discretion of the Director if it is found that the claim was established as a result of erroneous information furnished the claimant by the Department.

October Term, 1979

No. 79-7

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, ET AL.,

Appellants,

v.

JUDITH JAVA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF ON MERITS OF THE STATE OF MARYLAND, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, ET AL.,
Appellants,

v.

JUDITH JAVA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF ON MERITS OF THE STATE OF MARYLAND, AS AMICUS CURIAE

INTEREST OF THE AMICUS

The State of Maryland has heretofore filed a brief as amicus curiae in this Court in support of California's jurisdictional statement. The interest of the amicus as set forth in that brief fully supports Maryland's filing of this supplemental brief advancing specific recommendations to the Court.

ARGUMENT

I.

UNDER THE EXISTING STATE-FEDERAL EXCISE TAX SUPPORTED BENEFIT PROGRAM THE QUESTION CONCERNING PROMPT PAYMENT OF BENEFITS "WHEN DUE" CAN SAFELY BE LEFT TO SUPERVISED STATE CONTROL.

The Unemployment Insurance Compensation Program in every jurisdiction that operates under the provisions of the Social Security Act[1] and under the aegis and with the approval of the Secretary of Labor is an insurance program designed to assist in the maintenance of purchasing power. This is accomplished by the collection of an excise tax from employers and the payment of benefits to *eligible* claimants. Eligibility consists of earnings in proper base period amounts, reasons for leaving employment, and diligent job seeking while unemployed.

In most, if not all, jurisdictions there is a direct relationship between the rate at which the tax is paid by each employer and the amount of benefits received by claimants whose monetary eligibility was earned by working for that employer. In Maryland all benefits paid to claimants are charged against the base period employer regardless of the reason for separation from employment.[2]

It is obvious that the community has a direct interest in the prompt payment of benefits to persons who are fully eligible under the law; and that the employer has a critical interest in denial of benefits where the claimant is not fully eligible, or becomes unemployed for a disqualifying reason.

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[1] Act of August 14, 1935, c. 531, 49 Stat. 620, as amended, 42 U.S.C. §301-1305.

[2] (Unemployment Insurance Law of Maryland) Laws of Maryland, Second Extraordinary Session, Dec., 1936, c. 1, Maryland Ann. Code, Art. 95A, Section 8 (1969).

The law never has contemplated anything approximating universal coverage. Recent legislation affecting federal standards applicable to the states[3] will compel coverage of an additional four to five million persons under state programs, but this still leaves approximately seventeen million persons who render services in the United States for wages uncovered.

From the beginning there has been the exemption of particular classes of employers from the tax, and the resulting exemption of their employees from the benefits of the statutory scheme. See *Carmichael v. Southern Coal Co., Carmichael v. Gulf States Paper Corporation,* 301 U.S. 495 (1937).

In the case of *Goldberg v. Kelly,* 397 U.S. 254 (1970), each claimant was a recipient of a welfare award made to all persons similarly situated on a "needs" basis. Such benefits are financed out of the general revenue, and do not reflect adversely upon specific taxpayers. The only persons in interest in a claim dispute are the State and the claimant.

Equation of these programs for purposes of statutory construction or application of constitutional standards is not possible.

The thrust of the District Court opinion is that (1) the California law as applied is inconsistent with federal statutory requirements and (2) is violative of the United States Constitution. There is no finding by the Court that the Federal law[4] is unconstitutional. Presumably, the difficulty is that the legislature of California has created a system whereby the first determination (based largely on interview of the claimant) is peremptory in nature and where that proceeding is concluded favorable to the claimant, the

[3] P.L. 91-373.
[4] 42 U.S.C. §301-1305.

second hearing (the Referee) is often the first proceeding at which the facts favorable to the position of the employer are fully revealed and explored, and this after an average time of seven weeks.

Whether or not this particular compromise between immediate payment in all cases and the withholding of benefits until all appeals are exhausted is sound and productive of the result sought through applicable legislation is debatable. The average time will vary from state to state, and from place to place within a state. The important point is that the Congress imposed specific "lead" responsibility for insuring prompt payment "when due" upon the Secretary of Labor of the United States. There is no showing that the Secretary is incompetent in this respect.

The practice in California is obviously one of long and continuous standing, and with some variations is substantially followed throughout the nation, and has been for some thirty-five years. Weight must be given to long, continuous and unchallenged administrative practices in matters of statutory construction and application of constitutional sanctions.

The Appellee apparently convinced the District Court that the California law is an unwise law. The practice of permitting a median seven-week delay in the payment of benefits in certain cases was attacked. From a philosophical point of view, constitutional abnegation was reasoned.

We submit that the question ought not to be whether the California law is wise or unwise. The courts do not sit as super-legislative bodies. The Constitution ought not to be treated as an instrument to plug the leak in the dike whenever the Court feels that the spirit of a statute is not

being carried out. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

If the federal statute in question is valid and constitutional, and we have seen no challenge thereto, then the problem presented by this case ought to be initially approached from the point of view of enforcing that statute according to its terms and meaning rather than through disruptive sanctions based upon due process constitutional violation. We submit that if the crux of the problem is a conflict between the federal statute and the state statute and regulations promulgated pursuant thereto, great efforts should be expended by the judiciary to attempt to adjudicate the problem from the statutory approach of conformity of the state law to the federal standards envisioned by Congress with judicial invalidation of the state statute on constitutional grounds of due process infringement as an avenue of last resort. Admittedly, a state's administration of its unemployment insurance program, when under attack by any individual directly affected thereby, must withstand both statutory and constitutional judicial scrutiny; however, judicial concern for an individual's rights when couched in terms of the Fourteenth Amendment due process deprivation should be tempered with equal concern in not unduly extending the constitutional argument in evaluating a state statute complementing a federal statutory scheme of enforcement. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

II.

AFFIRMING THE ACTION OF THE DISTRICT COURT WILL CAUSE UNTOLD CONFUSION IN THAT "WHEN DUE" UNDER THE STATUTE OF EVERY STATE WILL BECOME A POTENTIAL CONSTITUTIONAL QUESTION.

It may well be that under the language of the unemployment insurance statute of Maryland or another state

"when due" does not occur until a determination favorable to a claimant has become final by virtue of the passage of the statutory appeal period without an appeal having been noted. If the matter is left to a question of due process based upon interpretation of this language and of the amount of time that passes before benefits are paid, a much more disruptive mechanism is brought into play than that which would presumably be employed by the United States Secretary of Labor in carrying out his statutory mandate.

If the matter is to be determined on the basis of possible economic needs of the claimant, and we do not negate the importance of prompt payments, what about other cases wherein the initial determination is against the claimant and payment of benefits is postponed pending further adjudication?

We submit that the existing statutory structure and procedure is a fine compromise and if a shortening of appeal periods and decision-making is required, it ought to be accomplished within the techniques of statutory enforcement.

CONCLUSION

For the reasons set forth herein and those heretofore advanced in Maryland's amicus curiae brief filed in support of California's jurisdictional statement, it is respectfully submitted that the interlocutory judgment of the United States District Court for the Northern District of California preliminarily enjoining enforcement of Section 1335 of the California unemployment insurance law should be reversed and that the matter be remanded to the District Court for such other proceedings as the Court may deem appropriate and necessary for the further review of California's modus operandi of Section 1335 against the background of the

federal and state statutory schemes of enforcement with specific invitation of the views of the Secretary of Labor.

Respectfully submitted,

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FILE COPY

FILED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 507

JUDITH JAVA, et al, *Appellees*,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al, *Appellants*.

On appeal from the United States District Court for the Northern District of California

Motion For Leave To File Brief As Amicus Curiae And Brief Of The Attorney General Of The State of Colorado On Behalf Of The Division Of Employment, Department Of Labor And Employment Of The State Of Colorado In Support Of Appellants Appeal.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 507

JUDITH JAVA et al, *Appellees,*

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al, *Appellants.*

On appeal from the United States District Court for the Northern District of California

Motion For Leave To File A Brief As Amicus Curiae And Brief Of The Attorney General Of The State Of Colorado On Behalf Of The Division Of Employment, Department Of Labor And Employment Of The State Of Colorado In Support Of Appellants Appeal.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General, acting for the Division of Employment, Department of Labor and Employment, of the State of Colorado, respectfully moves the Court for permission to file this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Honorable Duke W. Dunbar, Attorney General of the State of Colorado, is the chief legal advisor of all state agencies and is vitally concerned with the proper enforcement of all court decisions affecting the proper and legal administration of such agencies.

The Division of Employment of the Department of Labor and Employment of the State of Colorado is charged with the responsibility and authority to administer the Colorado Employment Security Act, Chapter 82 of the Colorado Revised Statutes 1963 as amended, and will be intimately affected in such administration by the Court's decision in this matter.

The Attorney General is fearful that the decision of the U. S. District Court in this matter, if affirmed, may lead to the following results:

1. A self-defeating and actual delay in payment of unemployment compensation benefits under the Colorado Employment Security Act.

2. Great confusion and disorderly processing of unemployment compensation benefits in Colorado.

3. Greatly increased administrative expense resulting in increased and unjustified taxation upon Colorado employers.

4. Possible invalidation of the Secretary of Labor's certification of Colorado conformity with the Social Security Act, 42 U.S.C. § 503, depriving the state of the benefits of the federal statute.

5. Judicial destruction of the "fault" principle in unemployment compensation programs, greatly increasing the already onerous tax load of the state and its citizens.

Unless otherwise designated herein, all references to "Sections" are references to the Colorado Employment Security Act, Chapter 82 Colorado Revised Statutes as amended, herein called the "Colorado Act" and the statutory language is appended hereto as indicated.

ARGUMENT

I

COLORADO'S EMPLOYMENT SECURITY ACT HAS DIFFERENT LANGUAGE THAN CALIFORNIA'S BUT THE STATUTORY INTENT AND THE PROCEDURES ARE SIMILAR.

Section 82-5-1 of the Colorado Act (Appendix "A") provides for filing of claims as prescribed by Regulations, which in turn provide for filing by mail in certain cases where claimant resides over 20 miles from a local employment office. Once claimant's "*qualifications*" for benefits is determined (i.e. the facts of separation from employment qualifying him for benefits) he must maintain his *eligibility* for benefits. Thus, he must report in person each week and *each week is in effect a separate claim.* (Regulation 7A, Appendix "B"). The *weekly* reporting requirement in unemployment claims is for the express statutory purpose of assuring that claimant is able and available for work and conducting a search for work and that he is not reemployed. *Thus, his eligibility for benefits becomes a weekly determination by the administrative agency.* Could it be possible, under the lower court's rul-

ing, that ultimately, *weekly evidentiary hearings* must be held to determine claimant's eligibility? Obviously, such a *legal clutter* would destroy the very ends sought by the beneficent purposes of unemployment compensation statutes.

Section 82-5-2 of the Colorado Act (*Appendix "A"*) provides for a deputy to "promptly notify the claimant and *any other interested parties of the decision.*" (emphasis added).[1]

The section goes on to give the deputy authority to reconsider his decision for good cause and provides for 11 days in which an interested party or the claimant may appeal from such decision. If such appeal is *not* made, *"such decision shall be final and benefits shall be paid or denied* in accordance therewith." (emphasis added). If an appeal is filed, then notice of same goes out and a referee's hearing is scheduled (*Section* 82-5-4 *Appendix "A"*). Then follows the most important sentence: *"Benefits with respect to the period prior to the final determination of the department shall be paid only after such determination."*

Section 82-5-4 (*Appendix "A"*) on appeals further provides that if there is a referee's hearing, and no appeal from the referee's decision, this latter decision *"shall be deemed to be the final deciison of the division."*

It is also to be noted that the Division can make a redetermination where there has been an error in computation, newly discovered wages, or *the amount of bene-*

[1] An "interested party" under the Colorado act includes any employer who has complied with the reporting requirements of the division with respect to wages or other information regarding such individual." Section 82-1-3 (12), (emphasis added). (Appendix "C")

fits has been fixed on the basis of misrepresentation of fact. Section 82-5-3 (*Appendix "A"*)"

Section 82-5-2 (2)(*Appendix "A"*) in the last sentence provides for the so-called "double affirmation" payment which most state acts have: That is, if any two "decision makers" (deputy, referee or the Industrial Commission), in sequence affirm an award, the same shall be paid *regardless of the final appeal outcome,* the only basic question then remaining being *whether or not the particular employer's account shall be charged.*

This recitation of the Colorado Act's provisions is made for the purpose of showing the statutory intent, inherent in the language, that *benefits shall be paid only after appeal,* except for the double affirmation provision.

Thus, while Colorado language varies from the California language, the *statutory* time for payment is clear, and the statutory "problem" is the same as here at issue.

Nevertheless, Colorado does *in fact* pay some claimants prior to the "due date" under the statute. This occurs primarily in three circumstances: 1) when the protest of employer is late, and payments have begun, but the "protest" raises substantial questions as to misrepresentations of fact, making a redetermination necessary; 2) when the protest contains inadequate information requiring further inquiry of both the claimant and employer and the employer response must be by mail from its out-of-state central office — in this type of case, delay in receiving responses may work a hardship on a claimant where the protest appears insubstantial, so payments are made to claimant pending substantiation of the protest statements; 3) where the initial computation of benefit

rights has been delayed by a division investigation as to employer coverage, amounts earned, or facts of separation, which may take two to four weeks; because of hardship to claimant, the accumulated benefits may then be paid without awaiting the eleven day protest period by employer.

In all cases, however, where a redetermination is necessary or where the protest responses become "substantial", payments are stopped and if the deputy determines a No Award, refund is "demanded". It is to be noted that, 1) the "demand" is vitiated when "double affirmation" occurs; 2) the "demand" is vitiated when a timely appeal is made, and 3) no collection effort is made since a deduction against future benefits will be made if no refund occurs.

The issues raised by the instant case relevant to Colorado procedures can thus be phrased in the following questions:

I. IS THE STATUTORY LANGUAGE UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS?

II. ARE THE ACTUAL PROCEDURES IN THE FEW INSTANCES WHERE PAYMENTS ARE COMMENCED AND THEN STOPPED (FOR REDETERMINATIONS) UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS?

III. INVERSELY, IS THE DIVISION IN VIOLATION OF THE COLORADO ACT WHEN IT PAYS CLAIMANT PRIOR TO "FINAL DETERMINATION"?

IV. WOULD NOT EMPLOYERS HAVE GOOD CAUSE TO ENJOIN DEPLETION OF THE FUND PRIOR TO FINAL DETERMINATION AS DEFINED BY THE ACT?

The Colorado Act has been certified by the Secretary of Labor as in conformity with the federal statute. If "when due" is to be changed by judicial decision in the name of due process, definitive guidelines should be established. The Colorado case of *Anderson vs. Industrial Commission* now before the *Colorado Court of Appeals* (*No.* 70-448) amply illustrates the problem and is therefore discussed at length below. What is "when due" *on the second week's claim, the third week's claim, the fourth* etc?

Appeals procedures in unemployment compensation cases should be simple, prompt and non-legalistic. *Rafferty v. State of New Hampshire Department of Employment,* 107 N.H. 387, 222 A 2nd 823 (1966).

II

EMPLOYERS AS A CLASS ARE PROPER AND NECESSARY PARTIES TO ANY PROCEEDING AFFECTING UNEMPLOYMENT COMPENSATION FUNDS AND THE RATE OF TAX.

Under the Colorado Act as under most state employment security acts, the employer involved, whether one or more (there may be several employers during a base period for determination of wage credits), are "interested parties" *Section* 82-1-3 (12) (*Appendix "C"*) and *Section* 82-5-2 (*Appendix "A"*). They therefore are entitled to

and receive notice of a claim filed by an ex-employee. They may protest, appeal, and appear. If they do so, they have standing throughout the proceedings including court review. Normally, the employer response to the first inquiry by the Division is in writing, while the worker has appeared before the Division in person (see Argument I). The employer's first personal appearance, if any, is at the referee's hearing where the claimant also appears. Such a hearing is in the nature of a trial de novo where all the evidence relative to the claim is presented, witnesses are confronted and cross-examined and documents introduced into evidence. *Section* 82-5-4 (*Appendix "A"*); *Regulation No.* 20 (*Appendix "D"*); 81 *Corpus Juris Secundum* 331.

The employer has standing because (1) his taxes alone have established the fund, and (2) his experience rating (i.e. his tax rate) will be affected by the outcome. Under the Colorado Act, as under the California act, employers pay the contribution tax creating the fund from which the benefits are paid to employees who become unemployed through no fault of their own. Employers also pay the federal tax which is used primarily for administration of the fund. *Internal Revenue Code,* § 3301 *and* § 3302; *Social Security Act,* 42 *U.S.C.* § 502. Employees pay nothing and suffer no deduction from wages in establishment (or administration costs) of the fund.

Do not employers then, on a due process basis, have standing to resist any disbursement from the fund, (threatening their account and rate of tax) before an "evidentiary hearing"? Are the "equities" of the parties involved any different? Put another way, do the employers have "less position" because (1) they are *sole* con-

tributors to the fund, and (2) thus, obviously more "affluent"?

Employers as a class are indispensible parties to this proceeding and should have been joined, *Rule* 19, *F.R.C.P.* The device of asking for injunctive relief or declaratory judgment should not be used to avoid proper jointure of parties.

"The machinery of government would not work if it were not allowed a little play in its joints." *Justice Holmes* in *Bain Peanut Co. of Texas v. Pruson,* 181 U.S. 499, at 501. The *legalistic* approach by claimants here could well put a straight-jacket of formality around the flow of millions of dolars of unemployment compensation payments made every week in this country, and cripple the purpose of the whole program, which is to level out the economic dips affecting both individuals and the country's economy as a whole.

III.

COLORADO COURTS HAVE BEFORE THEM THE KIND OF CASE WHICH CONCERNED JUSTICE BLACK IN HIS DISSENT IN *GOLDBERG vs. KELLY,* 287 U.S. 254 (1970).

Now lodged in the Colorado Court of Appeals, and doubtless to be certified to the Colorado Supreme Court because of the constitutional question involved, is *Raymond William Anderson vs. Colorado Industrial Commission (Ex-officio Unemployment Compensation Commission of Colorado) and Ace Disposal Service Co., Inc., Colorado Court of Appeals* 70-448.

The facts of the case are these: Claimant quit his job with "Ace" to accept a job which under the Colorado Act could not be considered better, because it did not last 90 days. Claimant was denied benefits at the outset by the deputy and no benefits were ever paid to claimant. Nevertheless, claimant appeals, inter alia, on the pertinent ground that *claimant was denied due process because he was not granted an evidentiary hearing before the deputy in the first instance.* The claimant *did* go through the appropriate, statutorily provided administrative appeals after denials but lays his due process arguments squarely on the *Goldberg* decision. Administratively, a "no award" was affirmed throughout the administrative appeals.

In *Anderson* then, the factual situation is different from either *Goldberg* or *Java, only in that no payments were ever made.* Thus, the *Anderson* case presents the "bare-bones" question — is the statute unconstitutional for lack of due process procedures, where the statute itself prescribes the remedies leading to an evidentiary hearing upon denial of benefits by the deputy? What claimant is saying in effect is that benefits *must be paid* prior to *any* hearing on the matter. It would be difficult if not "impossible" to shorten the time for referee hearings under the statute without destroying due process notice procedures. The alternatives would be to have a prior evidentiary hearing on *every claim* filed (an administrative impossibility), or to give the claimant, automatically, so many weeks of "free benefits", not chargeable to the employers. The second alternative may be desirable (although certainly not to employers who supply the "fund"), but that is a matter for legislative, not judicial, action. Furthermore, such a procedure might validly be the subject of a due process attack by employers generally,

given the context, intent and purpose of unemployment compensation programs historically. In fact, such second alternative would doubtless soon destroy the segregated fund arrangement, (the true "insurance concept"), since general taxes might be required in taking care of such "free" weeks, especially during sudden or prolonged lay offs in the labor market.

In any event, affirmance of the lower court in the instant case, followed by similar reasoning applied to the Colorado case (Anderson), would put into focus the very problems pointed up by Justice Black in his dissent in *Goldberg* (at page 1024 and 1025.):

> "In other words, although some recepients might be on the list for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them." • • •
>
> *In the next case, the welfare recepients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process.* • • • Thus the end result of this decision, may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recepient has had the benefit of full administrative and judicial review, including of course, the opportunity to present the case to this court. Since this process

> will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden would be that the government will not put a claimant on the rolls initially, until it has made an exhaustive investigation to determine his eligibility." (emphasis added)

Justice Black is thus pointing out that the procedures advocated here and next upheld in the Anderson case as "logically following", which are not written into the statute, and which were not intended by either Congress or the state legislature, would cause the very evils which claimants should wish to correct — that is, that the double affirmation clause would essentially be wiped out, and the standard of "speed", bogged down by hearings in *every case*, would be lost forever. Thus, "when due" would become a mockery; "with all deliberate speed" might be substituted or, worse yet, the whole insurance feature of the program abandoned for payments out of general taxes established without any determinations as to causes for separation, i.e. "anyone out of work gets benefits for x weeks." This then becomes merely a substitute or "add-on" welfare program, and, as such, is rather useless, since the rationale for specific employer taxes is lost.

This Honorable Court may take judicial notice that Congress recently passed and the President signed *HR* 14705 which greatly broadens the coverage of unemployment compensation. Nowhere in the long debate and review of this new federal statute, or in the statute itself, is there any mention, concern or alteration of the procedures to be followed in administration of the payments of benefit claims. Thus the legislative intent must have been to leave the administrative procedures as they are.

If the Court is to "formalize" the procedures involved, it should do so only upon remand and jointure of the other class involved, the employers, whose rate of tax and financial burden will be *directly* and *adversely affected* by an affirmance.

CONCLUSION

If the state acts provide unconstitutional procedures which lack due process, the court should say so. If the procedures used in some instances are in violation of the statutory process, and thus lacking in due process under a constitutional statute, that also should be said clearly. Cloaking substantive changes in the enacted legislation under the phrase "when due" is to beg the question. If, as stated by the lower court, "when due" requires judicial definition because the congress did not further define it, the Court should not *restrict itself* in giving procedural guidlines in its definition. The stability and future effectiveness of unemployment insurance programs cannot withstand the onslaught of vagueness; their very viability depends on speedy payments of claims, while maintaining the integrity of the fund from fraudulent and disastrous diminution. The balance is *not* between the state and the claimant; it is between the claimant and the employer. If the fund established is to lose its integrity as a fund administered as fairly as possible by the state, then perhaps a whole new system (possibly taxing employees as well) should be instituted. If we are to allow payments in all cases (as in *Anderson*) by the mere process of a "*claimant filling out a claim form*", then the state, in administering the fund, may of necessity *have to be the "moving appellant."* Employers acquiesce in many cases, where perhaps they should not, for various reasons:

Inertia, lack of time to search and respond, a feeling of "guilt" for having to discharge or lay-off a person in a "bad" labor market; but primarily, it is submitted, because they believe the state agencies will properly and fairly administer the fund to prevent fraud or abuse. Employers are *interested parties,* have not been joined in this action, (the particular employer in the Colorado Anderson case *was* joined as required by our statute) and to decide "due process' without employers represented before the bar and as if the claimant and the state were the only "adversaries" is to bake only half a cake, not only leaving out a proper party, but actually denying the left-out party "due process" in turn.

It is respectfully urged that the District Court be reversed or the cause remanded for jointure of California employers as a class

Respectfully submitted,

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Appendix "A"

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Employment

Section 106. 82-2-1, Colorado Revised Statutes 1963, is REPEALED AND RE-ENACTED, WITH AMENDMENTS, to read:

82-2-1. Division of employment created — commissioner. There is hereby created a division of employment within the department of labor and employment, the head of which division shall be the commissioner of employment. Whenever any law of this state refers to the department of employment or to the executive director of employment, said law shall be construed as referring to the division of employment or to the commissioner of employment, as the case may be.

ARTICLE 5

Claims for Benefits

82-5-1. Filing Claims for Benefit.—Claim for benefits shall be made in accordance with such regulations as the commission may prescribe. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service and shall make available to each such individual at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the department to each employer without cost to him.

82-5-2. Initial Determination. — (1) An individual designated by the division of employment, and hereinafter referred to as the deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid, and if valid, the earliest week with respect to which benefits may commence, if determinable, the weekly benefit amount payable and the maximum duration thereof.

(2) The deputy shall promptly notify the claimant and any other interested parties of the decision, including the earliest week with respect to which benefits may commence, the weekly benefit amount, and the maximum duration thereof, and the reasons for the decision. The deputy, for good cause, may reconsider his decision and shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested party, within eleven calendar days after either the delivery of the deputy's notification, or after such notification was mailed to his last known address, whichever occurs first, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. A mailed notice shall be deemed served on the date of mailing. If an appeal is duly filed, the department shall give notice thereof to the parties entitled to notice of the original determination. Benefits with respect to the period prior to the final determination of the department shall be paid only after such determination. If a referee affirms a decision of the deputy, or the commission affirms a decision of a referee, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

82-5-3. Redeterminations. — (1) The department may reconsider a determination whenever it finds that an error in computation or identity has occured in connection therewith, or that wages of the claimant pertinent to such determination but not considered in connection therewith, have been newly discovered, or that benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentations of fact. The commission shall prescribe by regulation for the establishing of time limits within which requests for redetermination may be allowed.

(2) Notice of any such redetermination shall be promptly given to the parties entitled to notice of the original determination, in the manner prescribed in this section with respect to notice of an original determination. If the amount of benefits is increased or decreased upon such redetermination an appeal therefrom solely with respect to the matters involved in such increase or decrease may be filed in the manner and subject to the limitations provided in section 82-5-4.

(3) Subject to the same limitations and for the same reasons, the department may reconsider the determination in any case in which the final decision has been rendered by a referee, the commission or a court, and may apply to the referee, commission or court which rendered such final decision to issue a revised decision.

(4) In the event that an appeal involving an original determination is pending as of the date a redetermination thereof is issued such appeal, unless withdrawn, shall be treated as an appeal from such redetermination.

82-5-4. Appeals. — Unless an appeal is withdrawn, a referee, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. Whenever an appeal involves a question as to whether services were performed by a claimant in employment or for an employer, the referee shall give special notice of such issue and of the pendency of the appeal to the employing unit and to the department both of whom shall thenceforth be parties to the proceeding and be afforded a reasonable opportunity to adduce evidence bearing on such issue. The parties shall be duly notified of such referee's decision together with his reasons therefor, which shall be deemed to be the final decision of the department unless within eleven days after the date of notification or mailing of such decision, further appeal is initiated pursuant to section 82-5-6.

Appendix "B"

REGULATION NO. 7A

REGISTRATION FOR WORK AND FILING CLAIMS EXCEPT IN CASES OF PARTIAL UNEMPLOYMENT

(Revised January 14, 1963)

Pursuant to authority granted to the Commission by Section 82-4-7(2) and other provisions of The Colorado Employment Security Act, the Commission hereby adopts and promulgates the following regulation:

A. To qualify for unemployment compensation benefits, an unemployed worker who lives within twenty miles of a public employment office or itinerant service point or representative thereof must register for work and file an initial claim for benefits with the nearest public employment office or itinerant service point or representative thereof, and thereafter, unless otherwise instructed, continue to apply for work and to file continued claims for benefits each week. The term "initial claim" as used in this regulation means a claim filed to establish a new benefit year or to begin a new claim series in a previously established benefit year.

B. The Department, for reasons found to constitute good cause, may permit an individual to report to another Colorado public employment office or itinerant service point or representative thereof for the purpose of filing continued claims for benefits.

C. The Department, for reasons found to constitute good cause for failure to report to the public employment office or itinerant service point or representative

thereof on the scheduled date, may accept a continued claim from any individual effective as of the first day of his week of total unemployment if such continued claim is filed within seven days of his regular reporting day.

D. Any person who by reason of his return to full time employment is unable to report to a local office or itinerant service point or representative thereof to file his continued claim as scheduled may file such claim by mail within seven days of his scheduled reporting day.

E. If in the judgment of the Department of Employment or the Industrial Commission of Colorado, acting as ex-officio Unemployment Compensation Commission of Colorado, it is found that such time limits as set forth above would be arbitrary or unreasonable because of compelling reasons or hardships which have prevented the filing within the period so provided by the regulation above, the Department or Commission may permit the acceptance of a claim subsequent to a period set forth by the above time limits, but not more than six months from the last day of the aforementioned time limits period.

All regulations or parts of regulations in conflict herewith are repealed.

Appendix "C"

82-1-3. Definitions. — As used in this chapter, unless the context clearly requires otherwise:

• • •

(12) "Interested party" to any benefit decision means the individual who is claiming benefits, the department, and any employer who has complied with the reporting requirements of the department with respect to wages or other information regarding such individual.

Appendix "D"

82-5-7. Procedure. — (1) The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the commission for determining the rights of the parties whether or not such regulations conform to common law or statutory regulations of evidence and other technical rules of procedure.

(2) When the same or substantially similar evidence is relevant and material to the matters in issue in claims by more than one individual or in claims by a single individual with respect to two or more weeks of unemployment, the same time and place for considering each such claim may be fixed, hearings thereon jointly conducted, a single record of the proceedings made, and evidence introduced with respect to one proceeding considered as introduced in the others, provided that in the judgment of the tribunal having jurisdiction of the proceeding, such consolidation would not be prejudicial to any party.

(3) No person shall participate on behalf of the department or the commission in any case in which he has a direct or indirect interest.

(4) A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded but need not be transcribed unless the disputed claim is further appealed.

REGULATION NO. 20

APPEALS ON DISPUTED CLAIMS

Pursuant to authority granted to the Commission by Section 82-5-7 and other provisions of The Colorado Employment Security Act, the Commission hereby adopts and promulgates the following regulation:

A. Appeals to Referees.

1. Procedure for Filing Appeals

   a. An appeal from a decision of the deputy shall be by written notice of appeal stating reasons therefor. Such notice shall be in any form which signifies an intent to appeal and shall be filed in the public employment office at which the disputed claim was filed or with the central office of the Division. The Division shall mail a copy of such notice to each party to the appeal.

   b. Notices, specifying time and place, shall be mailed to each party to the appeal at least seven days before the scheduled hearing date.

2. Disqualification of a Referee.

   Challenges to the interest of a referee in an appeal scheduled to be heard by him shall be heard and decided by him or, in his discretion, referred to the Commission.

3. Hearing the Appeal.

   a. Hearings shall be conducted informally and in such manner as to ascertain the substantive rights of the parties. All relevant issues shall be considered and passed upon. Parties to the appeal

may present any pertinent evidence. The referee shall examine such parties and opposing parties may cross-examine each other and the others' witnesses. The referee, after notice to the parties, may hear such additional evidence as he deems necessary.

b. With the consent of the referee, parties to an appeal may stipulate to the facts in writing. The referee may decide the case on the facts so stipulated, or, in his discretion, set the appeal down for hearing and take such additional evidence as he deems necessary.

4. Adjournment of Hearings.

a. The referee may grant requests for adjournment when, in his own best judgment, such an adjournment will result in adducing all necessary evidence and be equitable to the parties.

b. In the event the party appealing the decision of the deputy fails to appear at the time and place scheduled for the hearing before the referee without good cause as determined by the Division and of which notice has been duly made, such non-appearance shall constitute a withdrawal of the appeal under the provisions of Section 82-5-4 of the Act, and the decision of the deputy shall become final.

5. Decisions by the Referee.

The referee shall announce, in written and signed form, his findings of fact, decision and reasons therefor as soon as practicable after a hearing and a copy thereof shall be mailed to all parties to the appeal.

B. Appeals to the Unemployment Compensation Commission of Colorado.

1. Procedure for Filing Appeals.

a. An appeal from a decision of a referee shall be by written notice of appeal stating reasons therefor. Such notice shall be in any form which signifies an intent to appeal and shall be filed in the public employment office at which the disputed claim was filed or with the central office of the Department. The Department shall mail copies of such notice to each party to the appeal.

b. Notices, specifying time and place, shall be mailed to each party to the appeal at least seven days before the scheduled hearing date.

2. Hearing the Appeal.

a. The Commission may limit the parties to argument on the record or it may take or direct the taking of any additional evidence considered necessary to reach a decision.

b. When the Commission remands an appeal to the Division with a direction to take additional evidence, the referee shall follow the established procedure for hearing appeals and such evidence shall be returned to the Commission.

3. Hearing Appeals on Commission's Own Motion.

a. Within eleven days of a decision by a referee and in the absence of a notice of appeal by any of the parties, the Commission, on its own motion, may order the parties to appear before it for a hearing.

b. Notices, specifying time and place, shall be mailed to each party to the appeal at least seven days before the scheduled hearing date.

c. The same procedure prescribed in this Regulation for conducting hearings before referees shall be followed by the Commission.

4. Hearing Pending Appeals on Cases Removed from Referee to Commission.

When the Commission removes a pending appeal to itself, the same procedures prescribed in this Regulation for notice to the parties and conducting hearings before a referee shall be followed by the Commission.

5. Decisions by the Commission.

a. Decisions shall be signed by those members of the Commission who hear an appeal and copies thereof mailed to all the parties.

b. The decision of the majority shall control; provided, however, that a dissent stating reasons therefor may be filed by the minority.

6. Disqualification of Commissioner.

Challenges to the interest of a Commissioner shall be heard and decided by the Commission.

C. General Provisions.

1. The Division may, after notice to the parties, request an agency which administers the Employment Security Act for another state to take evidence in that state for use by the Division. Such agency, after

notice to the parties, may follow the procedure prescribed by the law and regulations of that state for conducting hearings.

2. Subpoenas.

a. The Department shall issue subpoenas to compel attendance of witnesses and production of records for a hearing before a referee or the Commission only upon a showing of a necessity therefor.

b. A subpoenaed witness shall be paid fees according to the following schedule:

Witness fee ..... Two Dollars per day
Mileage fee ..... seven and one-half cents per mile

3. Representation at Hearing.

a. In a proceeding before a referee or the Commission an individual may appear for himself; a partnership may be represented by any partner or a duly authorized representative; and a corporation or association may be represented by an officer or duly authorized representative.

b. Any party may designate another person to represent him as counsel in an appeal proceeding before the Division or Commission; provided, however, that any person, other than an attorney-at-law, duly admitted to the practice of law in any state or a territory of the United States, shall not charge or receive any fee for representing such party.

c. The Commission may refuse to permit any person to represent others in a proceeding before it or the Division who it finds is guilty of unethical

conduct or who intentionally and repeatedly fails to comply with the Act, its regulations, or with instructions of said Commission.

4. Preserving Records of Decisions.

Copies of all decisions of referees and the Commission shall be kept in the main administrative office of the Division in Denver, Colorado. Copies of such decisions may be obtained upon written request therefor; provided, however, that copies so released to other than parties to the appeal proceeding shall in no manner reveal the names of the parties or witnesses therein.

5. Reopening Hearing in Case of Non-appearance.

An interested party not present at a hearing before a referee or the Commission may request such referee or the Commission, as the case may be, to reopen the hearing. Such request must be made in writing within 10 days from the date the original hearing was held, and no hearing shall be reopened unless the requesting party establishes to the satisfaction of the referee or the Commission, as the case may be, that there was good and sufficient cause for his failure to appear at the said hearing.

All regulations or parts thereof in conflict herewith are repealed.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, Et Al., Appellants

v.

JUDITH JAVA, Et Al., Appellees

On Appeal From The United States District Court
For The Northern District Of California

BRIEF for the STATE OF NEW HAMPSHIRE AND the STATE OF TENNESSEE, AS AMICUS CURIAE

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NO. 507

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1970

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, Et Al., Appellants

v.

JUDITH JAVA, Et Al., Appellees

On Appeal From The United States
District Court For The Northern
District Of California

BRIEF for the STATE OF NEW HAMPSHIRE AND the STATE OF TENNESSEE, AS AMICUS CURIAE

INTEREST OF AMICUS

The State of New Hampshire, through its Department of Employment Security, administers as part of a National scheme a program paying unemployment compensation to those unemployed qualifying under N. H. RSA 282 which could be

profoundly affected by the Court's decision. The State of New Hampshire urges that this Court reverse the District Court's decision.

STATEMENT

A three-judge District Court sitting in the Northern District of California has granted a preliminary injunction finding "Calif. Unempl. Ins. Cde. s. 1335 defective on both constitutional and statutory grounds." The District Court found the case to be "indistinguishable" from the decision of this Court in *Goldberg* v. *Kelly,* 397 U.S. 254, as to due process considerations and that unemployment benefits were terminated in violation of 42 U.S.C. s. 503 (a) (1) which required that payments be made "when due."

ISSUES OF LAW

I. Does the California statute or method of administration violate 42 U.S.C. s. 503 (a) (1) which provides that in order for California to be certified by the Secretary of Labor and thereby receive administrative grants the California statute shall provide "such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;" ...?

II. Are the decisions of this Court in *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969) and *Goldberg* v. *Kelly, supra,* indistinguishable from the case at bar?

III. Does California by statute or by the administration of its unemployment compensation law deny procedural due process in violation of the Due Process Clause of the Fourteenth Amendment?

ARGUMENT

I.

THE CALIFORNIA STATUTE AND ITS ADMINISTRATION COMPLIES WITH 42 U. S. C. S. 503 (a) (1) WHICH PROVIDES THAT IN ORDER FOR CALIFORNIA TO BE CERTIFIED BY THE SECRETARY OF LABOR AND THEREBY RECEIVE ADMINISTRATIVE GRANTS THE CALIFORNIA STATUTES MUST PROVIDE "SUCH METHODS OF ADMINISTRATION . . . AS ARE FOUND BY THE SECRETARY OF LABOR TO BE REASONABLY CALCULATED TO INSURE FULL PAYMENT OF UNEMPLOYMENT COMPENSATION WHEN DUE;"

When the Social Security Act was passed in 1935 it represented a new principle of social insurance to the American public and to American law. The Depression had made it clear that the small communities lacked the fiscal organization and resources to meet the exigencies of mass unemployment on a charitable basis; and relief failed to stabilize consumer demand in the crucial incipient stages of a depression. In terms of the community values involved both the techniques of giving charity, particularly the "means" or "needs" test, and the psychological impact of receiving "charity," undermined the self-respect and independence of the unemployed. It was these economic and ethical deficiencies to which the unemployment compensation provisions of the act responded.

The ethical aspect of this new community response lay in the social insurance principle that payments be made to an eligible claimant as a matter of right and not on a subjective test of need. Supporters and opponents of the Social Security Act were agreed that in this principle was an essential difference between unemployment compensation and charity.[1]

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[1] *Steward Machine Co.* v. *Davis*, 301 U.S 548.

The social objective of unemployment compensation is achieved through the payment of benefits to eligible unemployed persons, and the success of the program depends upon an effective operation of the administrative process in promptly getting these payments out to those entitled to them. Persons who have worked in covered employment (for an employer liable to pay the tax) and have received wages during the base period equal to certain amounts specified in the law, have available for their benefit when unemployed under appropriate conditions a fixed amount related to the amount of wages received, against which they may after a waiting period draw solely on a week-to-week qualification basis as a matter of right without regard to their economic position.

This right to receive benefits is not absolute. It may be postponed if the unemployment is not involuntary within the meaning of the law. It may be entirely defeated, generally, if the person does not perform certain conditions precedent, register for work and report, if he is not able to work, or if, though able, he is not honestly looking for work (that is if he is not a bona fide member of industry's labor force), does not expose himself unequivocally to all the suitable job opportunities which may reasonably be expected to be found in the labor market. To determine how much he has to his credit, if any, and whether he has the immediate right to draw against this credit, is a function of the administrative process subject to review by the courts.

The Social Security Act places on the Secretary of Labor the duty to examine the law and administration of each state's unemployment compensation law and to determine whether the state in its methods for reaching these conclusions and in the conclusions themselves provides "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;"[3] If the state passes this test (and others not material to this case) certain benefits flow to the state and the

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[3] 42 U.S.C. s. 503 (a) (1).

employers doing business therein. ". . . the only consequence of the repeal or excessive amendment of the (state) statute or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses is that approval of the (state) law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. S. 903 (b) (c)."[3]

The states are not compelled to abide by this requirement and failure results neither in the invalidity of the state act nor in vitiating the state's administrative system, but results in the withdrawal of the Secretary of Labor's approval and the end to employment security administrative grants to the state. *Steward Machine Co.* v. *Davis, supra.*

The conformity of particular statutory conditions and administrative approaches to the federal requirements depends upon the interpretation of the requirement by the Secretary of Labor who has the duty to enforce adherence to the federal standards. The Secretary of Labor in his decision in the 1955 conformity hearings against California took the position that his duties of enforcement require him to make certification determinations on the basis of his own interpretation of the federal standards. Supplemental Brief, appendix "E," pp. 3-4.

In view of the cryptic nature of the standard it is almost inconceivable that Congress could have intended the Secretary to be responsible for enforcing them but not to be responsible for interpreting them. The Secretary is not limited, in his power to deny or to revoke certification by the requirements of the federal standards. Some additional standards may be said to be implicit such as Constitutional requirements. The Secretary of Labor is probably limited only by judicial relief for "abuse of discretion."[4]

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[3] *Steward Machine Co.* v. *Davis, supra,* @ 594-595

[4] See *Parker, Administrative Law Problems in the Unemployment Insurance Program, 8 Vand. L. Rev.* 436, 440-441 (1955); *108 Cong. Rec.* 771, 87th Cong. 1st Sess. (1962) (memorandum of Rep. Brown).

The District Court has, in effect, reversed the Secretary of Labor's determination certifying that the California law and its administration did provide such methods as to be "reasonably calculated to insure full payment of unemployment compensation when due."

That the Secretary of Labor does not take his duty in this regard lightly and that his certification is by no means automatic or proforma is evidenced by the fact that in 1949 and again in 1955 conformity hearings were instituted against California.

The Secretary of Labor was not a party before the District Court. Does its judgment now require him, without an opportunity for hearing, to reverse his decision and find that the State of California is no longer entitled to the benefits previously granted to it? It appears that the District Court has usurped the power of the Secretary of Labor and has, in effect, found that he acted arbitrarily and capriciously in certifying the law and administration of the California unemployment compensation law despite the fact that the Secretary of Labor has considered this method of administration each year for a number of years and has found that it was "reasonably calculated to insure full payment of unemployment compensation when due."

The California practice does not fall by failure to meet the federal requirement, first, because such failure would not invalidate the practice, and second, the determination is for the Secretary of Labor in the first instance to make, and third, it is a method "reasonably calculated to insure full payment when due."

The administration of the unemployment compensation program is a state responsibility, and is accordingly, based upon 51 independent state and territorial systems linked by cooperative guidance from the Secretary of Labor. Each state, as well as the District of Columbia, has a law of its own making. Each state has exercised its sovereign right to adopt its own type of

administration, with the result that there is considerable diversity among the states in the composition of their administrative agencies and in the composition and procedures of the impartial tribunals created for the adjudication of disputed claims.[5]

The District Court recognizes no test of reasonableness despite that requirement in the federal act. The term "reasonably calculated" should not be read out of the federal requirement. Such a term connotes that there are a variety of methods which will insure prompt payment. The statute does not require instantaneous guaranteed payment upon the issuance of an initial payable decision. The statute clearly indicates a prohibition against paying those who have not met the conditions precedent to eligibility. The District Court also ignores the statutory mandate that payment be made only "when due." Java was found, after a hearing which afforded her all the requirements of procedural and substantive due process, not to be one of those to whom unemployment compensation payments were due. She did not satisfy the conditions of entitlement which in effect delineate the risk which the law was designed to cover. These eligibility provisions limit the risk, in effect, to involuntary unemployment due to economic conditions. This was the Congressional understanding of "unemployment" and is supported in the legislative history of the Act.[6]

That Congress recognized there must be a time provided for appeal and hearing is evidenced by its passage of the unemployment act for the District of Columbia (Appendix B) in which it provided:

> "Benefits shall be denied or, if the claimant is otherwise eligible, paid promptly in accordance with such initial determination except as hereinafter otherwise provided. . . . If an appeal is duly filed with respect to

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[5] See N.H. RSA 282:5-B (2), Appendix A; District of Columbia Code s. 46-311 (b), Appendix B; and Tennessee Code, Title 50, Chapter 13, s. 50-1325, Appendix C.

[6] See S. Rep. No. 628, 74th Cong., 1st Sess. 11-12 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-7 (1935).

> a matter other than the weekly benefit amount or maximum duration of benefits payable, benefits with respect to the period prior to the final decision of the Board shall be paid only after such decision."

In providing an unemployment compensation law for the District of Columbia the Congress recognized that, unlike welfare, parties other than the potential recipient were involved and had rights. Employers also could appeal and were entitled to the same notice and opportunity for hearing before payment was made as the claimant before payment was finally denied.[7]

The insistence of the District Court that payments be made to an individual whose entitlement to unemployment compensation benefits is in issue, without regard to the employer's right or lack thereof, creates a chaotic condition impossible of reasonable administration to insure full payment of unemployment compensation when due.

Risk-delimiting conditions are almost as basic to unemployment compensation as is its ethical import, they have the impregnable virtues of venerability, necessity, and statutory sanction to secure them against so much as a suggestion of inconsistency with the federal standards. The states must delimit the risk to be covered by their laws so that only "unemployment" is included. Conditions precedent to eligibility serve that end and are not only permitted but to some degree affirmatively required by the act.[8]

II.

THE DECISIONS OF THIS COURT IN *SNIADACH* V. *FAMILY FINANCE CORP. (SUPRA)* AND *GOLDBERG* V. *KELLY (SUPRA)* ARE DISTINGUISHABLE FROM THE CASE AT BAR.

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[7] *Woodridge Nursery School* v. *Jessup*, 269 A. 2d 199 (1970).

[8] 73 Yale Law Journal 357.

The case of *Sniadach* v. *Family Finance Corp. (supra)* is clearly distinguishable. There was no question but what Sniadach had earned her wages from Miller Harris Instrument Co., her employer. Whether or not the wages were due was not in issue. No question was raised as to whether Miller Harris Instrument Co. owed her the wages. The question was should her wages, her property, be kept from her and held pending the settlement of whether she owed a third party a debt not associated with her wages and not related to whether or not she was entitled to the sum withheld. In fact Family Finance Corp.'s position was that the sum held did belong to Sniadach but that it should be held as security for her debt to it. In the instant case the matter awaiting decision was whether or not Java and Hudson were entitled to any sums. At the time of the hearing before the District Court it could not be said that either, neither or both had a right to unemployment compensation. It was not then known whether anything would ever be due Java or Hudson.

The case of *Goldberg* v. *Kelly (supra)* is no less difficult to distinguish from the case at bar. Vital to the Court's decision is its statement at page 261:

> " ' By hypothesis a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.' *Kelly* v. *Wyman, 294 F. Supp. 893, 899, 900 (1968).*"

If there is one basic feature setting unemployment compensation apart from welfare it is the absence of this consideration.

The committee reports[9] on the Social Security Act, make clear that the absence of a "need" or "means" test as a condition precedent to eligibility was considered the single most

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[9] S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); and Congressional debates 79 Cong. Rec. 5468 (1935) (remarks of Rep. Doughton).

characteristic feature distinguishing unemployment compensation from relief.[10] The requirement that payments be made only "with respect to unemployment" read in light of the principle of social insurance prohibits a "need" or "means" test. A payment predicated upon "need" or the satisfaction of a "means" test is made not with respect to "unemployment" but with respect to "needy unemployment." "Unemployment" plus need is an impermissible basis for payment. The Congressional purpose to eliminate the "means" test in itself distinguishes the *Goldberg* case and renders inappropriate and misleading the allegations of the Appellees which attempt to obfuscate the issue and give their case the color of similarity to the welfare cases considered by the Court in *Goldberg* v. *Kelly (supra)*.

Another basic difference between the program of Aid to Families with Dependent Children or New York State's Home Relief program and the unemployment compensation program is the parties involved. Determinations in the welfare field are between the public represented by the state agencies and its officials and the needy recipient. In unemployment compensation the parties not only include the public through the state government and the claimant but also the claimant's last or most recent employer who has rights of appeal and to be heard similar if not identical to the individuals claiming a right to unemployment compensation.

In the cases before the Court in *Goldberg* v. *Kelly (supra)* a final binding determination of entitlement had been made. No appeal or any other action was pending with regard to that determination. In the pending action it is their initial entitlement which was in issue. In the *Java and Hudson* case there had not been a final decision. The opposing party (the employer) had contested the claimants' basic right to entitlement *ab initio*. It was not whether entitlement continued but whether it existed at all. The existence of this additional interested party whose rights are also involved in the determination

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[10] 73 Yale Law Journal 377.

removes the case at bar from any semblance of similarity with the case of *Goldberg* v. *Kelly (supra)*.

In *Kelly* v. *Wyman (supra)*, @ 901, the Court pointed out that a high percentage of those appealing decisions denying benefits were found to be payable, i.e. 26% of the appellants were found entitled to welfare. This situation is drastically different in unemployment compensation programs; for example, in New Hampshire in 1968 less than 19% of the initial determinations denying benefits did the claimant appeal, in 1969 less than 18%. Employers in each of those years appealed only 1/10 of 1% of the determinations allowing the payment of unemployment compensation. All appeals amounted to less than 4% in 1968 and 3% in 1969. Of the small number of appeals by employers, benefits were denied in 80% of the cases each year while claimants were found entitled to benefits in only 19% of the cases they appealed.

This Court's decision in *Goldberg* v. *Kelly (supra)* should be no more controlling in this instant case than was this Court's decision in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) determinative of *Kirk* v. *Board of Regents*, ____Cal. App. 2d ____, 78 Cal. Reptr. 260 (1969), appeal dismissed 396 U.S. 554 (1970). In the *Shapiro* case, a one-year residency requirement as a condition precedent to eligibility for welfare was struck down as a violation of the equal protection clause of the 14th Amendment. The Court noted that the benefits in question were "the very means to subsist — food, shelter and other necessities of life." In the *Kirk* case, the Court upheld a one-year residency requirement for free tuition at the state university distinguishing *Shapiro* on the ground that *Shapiro* "involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children." No such basis underlies the concepts and/or payment of unemployment compensation which has always been distinguished from welfare.

Entitlement to unemployment compensation should not be held to create a vested property right before adjudication. In

this regard it is more similar to the award of disability benefits under the Social Security Act than welfare payments.[11]

III.

NEITHER BY STATUTE NOR THE METHOD OF ADMINISTERING ITS UNEMPLOYMENT COMPENSATION LAW DOES CALIFORNIA DENY PROCEDURAL DUE PROCESS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Java, Hudson and their respective employers all were entitled to and did receive a full and impartial hearing which satisfied every aspect of due process. They could introduce evidence, produce witnesses, cross-examine witnesses, testify or not as they chose, as well as present oral and/or written argument so that the tribunal could determine factually whether each individual claimant had a right to unemployment compensation. This impartial tribunal found Java did not have a right to unemployment compensation and that Hudson did. The single fact that the payment of unemployment compensation was stayed pending the determination of whether the right to it existed for six to seven weeks does not destroy California's guarantee of due process. That period in fact compares favorably with the delay of some four months which existed in *Goldberg* v. *Kelly*.

The State of California went even further than the due process or its statute's requirement. It paid to both Java and Hudson one or two checks before their entitlement was established and before any decision became final. California apparently took a calculated risk that because few employers raise objections to a claimant's entitlement it could make payments without regard to the employer's statutory rights and before he had an op-

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[11] See *Messer* v. *Finch*, 314 F. Supp. 511 (1970); *King* v. *Finch*, 428 F. 2d 709 (1970); *Dandridge* v. *Williams*, 397 U.S. 471.

portunity to raise any question of entitlement. In effect California said so few employers exercise their rights we will make a gift to those claimants who are later found not to have any right to unemployment compensation.

As Judge Frankfurter said in his concurring opinion: "Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, . . ."[13]

Most of the cases dealing with Due Process deal with one-sided situations, that is, a private individual or company or class standing in similar positions against the power of the state, and whether the requirements of the 14th Amendment were observed was examined from one view only. That is not the case here as there are rights of private parties, which are opposed to the alleged right to unemployment compensation, Java's employer and Hudson's employer. They are also entitled to the protection afforded by the 14th Amendment.

The statement by Justice Harlan, pp. 343, concurring opinion, *Sniadach* v. *Family Finance Corp., (supra)* aptly describes the situation of the employers and the state: "I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."

The cases dealing with the denial of disability benefits under the Social Security Act are more nearly in point than are those dealing with welfare. In *King* v. *Finch, (supra)* the Court after discussing *Goldberg* v. *Kelly (supra)* and *Dandridge* v. *Williams (supra)* said: "Entitlement to these benefits has always been held not to create a vested property right before adjudication

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[13] *Hannah* v. *Larche*, 364 U.S. 420 @ 487.

or payment. *Flemming* v. *Nestor*, 1960, 363 U.S. 603." In *Messer* v. *Finch (supra)* an award of disability benefits under the Social Security Act was made. Messer received benefits, then the Secretary determined he was no longer eligible and payments were discontinued. Messer attacked this procedure relying on *Kelly* v. *Wyman (supra)*. The Court held that Messer was not denied due process as he had a right to judicial review and would if successful obtain retroactive benefits. This is precisely the position of both Java and Hudson.

In *Flemming* v. *Nestor (supra)* the Court concluded that a person covered by the Social Security Act "has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." pp. 611. If an accrued interest could be defeated cannot payment be stayed pending determination of whether or not any right exists?

"The authorized procedure is not incapable of affording the protection to petitioners' rights required by due process."[13]

The OPA experience supports the basic principle that a trial type of hearing is not required except when adjudicative facts are in dispute. The foundation case is *Yakus* v. *United States (supra)*. The Emergency Price Control Act of 1942 authorized issuance of price orders without advance hearings, requiring only that the Administrator should, "so far as practicable, advise and consult with representative members of the industry. . . ." The main procedural protection came after instead of before issuance of a price order, through a provision for protests supported by "affidavits or other written evidence." The Administrator was authorized to grant or deny a protest in whole or in part, or notice it for hearing; he could and often did limit a protest proceeding to the filing of written materials. *Yakus* was a criminal prosecution for violation of price regula-

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[13] *Yakus* v. *United States*, 321 U. S. 414 @ 435 (1944).

tions which had not been challenged by the protection procedure.[14]

It seems that the District Court is saying that the government can take property, concerning which there is no question but that right, title and interest is vested in one of its citizens, from any of those citizens and await later judicial determination as to whether the government had the right to take that property (*Phillips* v. *Commissioner*, 583 U.S. 589 and cases cited) but cannot fail to pay unemployment compensation to one of its citizens without regard to the rights of another of its citizens before the entitlement to such compensation is determined.

Although the Court was dealing with due process under the 5th Amendment in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, its comments are appropriate in determining the respective

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[14] See also *In Bourjois, Inc.* v. *Chapman*, 301 U.S. 183 (1937). The Court declared of an application for registration of cosmetics that neither the state nor the federal Constitution "requires that there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved," but the Court immediately went on to say that "the requirement of due process of law, is amply safeguarded" by a statutory provision for "appeal" to the superior court. Id. at 189. In *Columbia Auto Loan, Inc.* v. *Jordan*, 196 F. 2d 568 (D.C. Cir. 1952), a trial type of hearing was required on refusal to renew an insurance agent's license, but the requirement was satisfied by a de novo judicial review. In *Brooks* v. *Laws*, 208 F. 2d 18 (D.C. Cir. 1953), the court denied to an applicant for admission to the bar permission to bring mandamus, on the primary ground that a case or controversy was not presented. The court rejected a contention that the applicant had been denied hearing, partly because the applicant "had a full hearing before the Committee." Id. at 30. The court then declared that "the whole purport of admission to the bar in this country . . . is that the Committee and the court can inquire into the applicant's character by confidential inquiry. . . ." Ibid. Judge Edgerton, concurring in the result, declared: Elementary fairness and therefore due process of law forbid finally rejecting, on grounds of character, an otherwise qualified applicant without allowing him a public opportunity to confront his accusers and refute their charges.

rights of the three parties in this action. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. . . ." pp. 894.

And p. 895: . . . " 'Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is ' compounded of history, reason, the past course of decisions. . . .' *Joint Anti-Facist Comm.* v. *McGrath*, 341 U.S. 123, 162-163 (concurring opinion)."

And p. 895: "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

This is not the first time the Court has considered the constitutionality of paying unemployment compensation before hearing and without a final decision as to the potential recipient's entitlement. In *Pa. State Ch. of Commerce* v. *Torquato*, 125 A. 2d 755, cert. denied 352 U.S. 1024, the Pennsylvania court in a well-reasoned opinion found certain provisions of the Pennsylvania statutes unconstitutional as being in violation of the due process requirements of the 14th Amendment of the Constitution of the United States and of the Constitution of Pennsylvania. That case arose by reason of claims of unemployment compensation filed by former employees of Westinghouse Electric Corporation. The Pennsylvania Act provided that the Department must give notice to both the claimant and the employer concerning claimant's eligibility, and if eligible the weekly rate and maximum amount of compensation payable. The Department then is required to determine whether the claim is valid. Any such determination, unless either the claimant or the employer files an appeal with the Unemployment Compensation Board of Review within ten calendar days after the delivery of such notice, shall be final and compensation paid or denied in accordance with that determination.

"Procedural due process is accorded to both the employer and the claimant in the above mentioned administrative procedures." p. 760.

The act, however, went on to provide that when the board affirms a decision of a referee or of the department allowing compensation, such compensation shall be paid notwithstanding any further appeal; and that when a referee affirms a decision of the department allowing compensation, in the event of a further appeal to the board, such compensation shall be paid after a period of thirty days from the date of such further appeal if the board has not rendered a decision prior thereto. This proviso is clearly to the effect that compensation is immediately payable upon the affirmance of the Board; and is further payable within thirty days after the Referee affirms the decision of the Department awarding compensation if the Board does not take action within thirty days. This clause requires that payments be made forthwith without regard to judicial review when there are two findings in favor of claimants. The act went on to provide that an aggrieved party may appeal to the Superior Court but such an appeal would not act as a supersedeas. Therefore compensation would be payable notwithstanding any appeal to the Superior Court. The Court noted at p. 762:

> "It is, of course, apparent that where the Board orders the payment of unemployment benefits, the Fund must be depleted to the extent of the payments pending the determination of the legal questions in the Superior Court, as would also the credit balance in an employer's reserve account. These payments having been made, the question as to whether or not the claimants-employees are eligible to these benefits actually would be moot as to the payments already made when the case reaches the Superior Court.
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> "We do not believe that it is consistent with due process of law to require the payment of claims during the very period of time when the eligibility of the claimants for unemployment compensation is being litigated. To do so, in effect, is to permit the administrative officials for all practical purposes to make a final determination without

any adequate means for effective judicial review. We believe that substantial requirements of due process dictate that the status quo as to these payments be preserved until the Court which has statutory jurisdiction to determine the validity of these claims passes upon the legal questions involved.

"We agree with the lower Court that the statutory provisions requiring payment of unemployment compensation prior to judicial review and prohibiting an appeal to the (Superior) Court from acting as a supersedeas, violate the due process clause of the Constitution of the United States: *Porter, Auditor* v. *Investors Syndicate,* 286 U.S. 461, 471; *Aircraft & Diesel Equipment Corp.* v. *Hirsch et al.,* 331 U.S. 752, 773; *Pacific Telephone & Telegraph Co.* v. *Kuykendall,* 265 U.S. 196, 201, 205; *Oklahoma Natural Gas Co.* v. *Corporation Commission,* 261 U.S. 290; *Chicago, Milwaukee and St. Paul Railway Co.* v. *Minnesota,* 134 U.S. 418, 456, 457; *Chrysler Corp.* v. *Appeal Board of Michigan Unemployment Compensation Commission,* 3 N.W. 2d 302 (1942); *State ex rel. Campbell* v. *State et al.,* 57 N.E. 2d 433 (Supreme Court of Indiana, 1944); *Dallas Fuel Co.* v. *Horne et al.,* 300 N.W. 303 (Supreme Court of Iowa, 1941)."[15]

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[15] In *Porter, Auditor* v. *Investors Syndicate,* 286 U.S. supra, the Court said (pages 470, 471): "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis,* 241 U.S. 440, 454. But where either the plain provisions of the statute *(Pacific Tel. Co.* v. *Kuykendall,* 265 U.S. 196, 203, 204) or the decisions of the state courts interpreting the act *(Oklahoma Nat. Gas Co.* v. *Russell,* 261 U.S. 290) preclude a supersedeas or stay until the legislative process is com-

The Court held @ p. 765: "It is clear from the foregoing cases, particularly the above quoted and cited cases of the Supreme Court of the United States, that a statutory provision which directs that unemployment compensation in large amounts shall be made to claimants before the validity of their claims to such payments are or may be determined by a Court – in this case the Superior Court of Pennsylvania – is a violation of the due process of law requirements of s. 1 of the Fourteenth Amendment of the Constitution of the United States and also of s. 9 of Article I of the Constitution of Pennsylvania."

The Court in answering the claim that a stay in the payment of benefits would cause hardship and distress and that they would suffer by prolonged litigation even if their claims are decided to be just, said @ p. 767:

> "Although it is indisputable that the law's delays almost always cause successful litigants severe economic hardship, the answer is not to short circuit or violate the Constitution, but to expedite (by speed-up or elimination or otherwise) administrative procedure and the time for appeals. This can be further expedited by a test case.

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pleted by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

In *Chrysler Corp.* v. *Smith*, 298 N.W. 87, the Court said (p. 92): "Claimants invoked that part of s. 34 of the act, reading: 'Provided, That if the final decision of a referee affirms the initial or an amended determination, or the appeal board affirms the final decision of a referee, allowing benefits, such benefits, shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's experience record shall be charged with benefits so paid.'

"This, if held applicable in the instance at bar, would render administrative action superior to recognized judicial power in the premises and constitute the provisions relative to appeal and court procedure a nullity. If construed, as applicable in this instance, it would render due process of law, expressly recognized and provided for in the (administrative provisions of the) act, nugatory and a senseless gesture."

> "The special injunctive decree issued by the lower Court maintains the status quo and protects and preserves the rights of all the parties, plaintiffs and defendants alike, until each claim for unemployment compensation is decided by the Superior Court on its merits and in accordance with the applicable principles of law. That decree, we repeat, protects the Fund but does not bar any employe from presenting a valid claim for unemployment compensation and having such claim decided specifically or by appropriate ruling by the Superior Court. This was fair and proper, clear and just."

The Kentucky Court of Appeal also considered this same question in *Babb* v. *Bullitt,* 220 S.W. 2d 394, in which case the question was whether or not, under the provisions of the Unemployment Compensation Act, KRS 341.010 et seq., a claimant may be separated from or may voluntarily leave employment, without good cause, accept employment elsewhere, and force payment out of the reserve account of the previous employer without giving to that previous employer the right to protest such payment. The Court noted @ p. 395 that:

> "In such an instance, the taking of the employer's money has no reasonable or any relationship to the public weal or to the general welfare, and is in fact and effect the taking of money of one private individual by the legislature under the guise of a tax and transferring it to another without compensation. Such legislation to such extent is unconstitutional and invalid."

and at 398:

> " (I)f employers generally are so related to the unemployment problem that they can be required by a moderate tax to pay into a fund to be administered for the benefit of the unemployed, that it necessarily follows that they are not so

unrelated to the problem as to permit an indiscriminate payment of benefits out of the reserve solely created and maintained by that employer, without any right to protest or be heard."

The most recent case involving the employer's equal rights to due process arose under an act of Congress, the unemployment compensation law for the District of Columbia, in which the Court held that one of the purposes of the Act was to protect the rights of both parties by insuring fairness to the employer as well as the claimant in the administrative process. *Woodridge Nursery School* v. *Jessup, (supra).*

SUMMARY OF ARGUMENT

I. The Secretary of Labor has found that the California administrative procedure does comply with the Federal act. This determination is entitled to great weight. In fact his determination is correct.

II. Both Java and Hudson did have available to them proper administrative procedures guaranteeing them due process of law.

III. The employers are also entitled to due process of law which would be denied to them were the Court to uphold the District Court's decision.

CONCLUSION

For the reasons stated this Court should reverse the decision of the District Court.

Dated December 10, 1970.

Respectfully submitted,

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A copy of this Amicus Curiae Brief has been sent by prepaid airmail to all the parties.

Appendix A

New Hampshire Unemployment Compensation Law, Revised Statutes Annotated, Chapter 282:5-B (2)

(2) Determination. A determination shall be a decision by the certifying officer on a claim and shall be made, except as otherwise specifically provided in this chapter, as follows:

(a) A determination on the first claim in a benefit year and not immediately followed by a claim for waiting-period credit shall include: the annual earnings in the base period with the name of each employer reporting wages paid to the claimant, and the amount thereof, the maximum benefits then available, the maximum weekly benefit amount and the maximum duration thereof, and shall be mailed to the claimant.

(b) A determination on the first claim in a benefit year which is immediately followed by a claim for waiting-period credit shall be made promptly following the waiting period and shall include: the maximum benefits then available, the maximum weekly benefit amount and maximum duration thereof, whether or not, with the reasons therefor, the claimant will be payable for the week immediately following the waiting period and for consecutive weeks thereafter for which claims are filed (no other facts appearing to the contrary during such period), and identification of the employer whose account will be charged with benefits to be paid by reason of such determination. This determination shall in any case be mailed to all interested parties.

(c) A determination on an initial claim for total or partial benefits for any week except as in (a) and (b) above shall include: the maximum benefits then available, the maximum weekly benefit amount and maximum duration thereof, whether or not, with the reasons therefor, the claimant is payable for such week and for consecutive weeks thereafter for which claims are filed (no other facts appearing to the

contrary during such period), and identification of the employer whose account will be charged with benefits to be paid by reason of such determination. This determination shall in every case be mailed to all interested parties except the claimant where the determination is that he is payable.

(d) A determination shall be made by a certifying officer on any claim for benefits, though not an initial claim, where, in his judgment, there appears an issue relative to the entitlement of the claimant to benefits. The determination shall be in the manner provided in (c) immediately above and the interested parties shall be notified in the same manner.

(e) Nothing in this subsection shall be construed to require that a determination be made with respect to a claim for any week where the week follows immediately after a waiting period, or is one of any of the consecutive weeks for which benefits are paid immediately following such waiting period, or is one of any of the consecutive weeks for which benefits are paid immediately following the week with respect to which a determination is made under (2) (c) above except as provided in (2) (d) above.

(3) In finding the facts material to a claim, the certifying officer shall in every case where the reason for an individual's leaving employment may be material, send to the employing unit or employer for whom the claimant last performed services a request for information, such request to be in accordance with the regulations of the commissioner. When the information is not returned by such employing unit or employer as required by the regulations of the commissioner, the certifying officer shall proceed on the facts available to him and any benefits payable pursuant to such determination shall be charged to the account of the chargeable employer if he fails or refuses to return proper, factual information and even though the claimant is, by reason of some later decision, held not to be entitled to such benefits.

(4) A certifying officer may, within six months of any determination, for good cause reconsider his determination or any part thereof, provided there was no appeal taken from the determination. Such redetermination shall be made, and an appeal therefrom may be had, in the same manner as the original determination.

(5) Any claim or question involved therein may be referred by the certifying officer to an appeal tribunal, and such appeal tribunal shall make its decision with respect thereto in accordance with the procedure described in subsection C of this section.

(6) Any interested party may appeal from a certifying officer's determination by filing an appeal to an appeal tribunal within seven calendar days after the determination was mailed to his last known address. Provided, that if the commissioner finds sufficient grounds to justify or excuse a delay in filing an appeal, the time for filing said appeal may be extended by him.

(7) If no appeal from a determination by a certifying officer is taken within the time limits in (6) above such determination shall thereupon become final and benefits shall be paid or denied in accordance therewith, subject to the provision in (6) above relative to good cause for late filing of the appeal.

(8) A last employing unit or any employer whose account may become charged with benefits paid as a result of a determination by a certifying officer may waive, in proper form, in writing, his right to appeal from such determination prior to the making thereof, and in such case the determination shall become final upon the making thereof as to the issues involved, and benefits may be immediately paid pursuant thereto.

(9) Where an appeal has been duly filed the certifying officer's determination shall have no force or effect and benefits shall be paid or denied only in accordance with and subsequent to the decision of the appeal tribunal. Provided, however, that the certifying officer's determination shall continue to have effect as though no appeal had been filed with respect to all weeks of unemployment and any amount not affected by the appeal.

(10) Where an appeal tribunal affirms the determination of a certifying officer allowing benefits, such benefits shall be paid in accordance therewith without regard to any appeal to court under subsection G of this section, or reopening under subsection C of this section, up to the week in which such appeal to court is filed or request for reopening is received or the week in which reopening is directed when reopening is at the initiation of the commissioner, and the claimant shall be entitled to such benefits though the first decision of the appeal tribunal is later reversed, altered or in any way modified, and such benefits so paid shall be charged to the fund.

Appendix B

District of Columbia Unemployment Compensation Act, District of Columbia Code, 1961 Edition

Determination of Claims

Sec. 46-311. (a) Claims for benefits shall be made in accordance with such regulations as the Board may prescribe. Each employer shall post and maintain in places readily accessible to individuals in his service printed statements concerning such regulations or such other matters as the Board may by regulation prescribe. Each employer shall supply such individuals with copies of such printed statements or materials relating to claims for benefits as the Board may by regulation prescribe. Such printed statements or materials shall be supplied by the Board to each employer without cost to him.

(b) Promptly after an individual has filed a claim for benefits, an agent of the Board designated by it for such purpose shall make an initial determination with respect thereto which shall include a determination with respect to whether or not such benefit may be payable, and if payable, the week with respect to which payments will commence, the maximum duration thereof, and the weekly benefit amount, except that in any case in which the payment or denial of benefits will be determined by the provisions of section 46-310 (e), the agent shall promptly transmit such claim to an appeal tribunal which shall make a decision thereon after such investigation as it deems necessary, and after affording the parties opportunity for fair hearing in accordance with subsection (e) of this section, and the claimant and interested parties shall be given notice thereof and permitted to appeal therefrom to the Board and the courts as is provided in this chapter for notice of, and appeals from, decisions of appeal tribunals. An initial determination may, for good cause, be reconsidered. The claimant and other parties to the proceedings shall be promptly notified of the initial determination or any amended determination and the reasons therefor. Benefits shall be denied or, if the claimant is otherwise eligible, paid promptly in accordance with such initial deter-

mination except as hereinafter otherwise provided. The claimant or any party to the determination may file an appeal from such initial determination or from a reconsideration of such determination within ten days after notification thereof, or after the date such notification was mailed to his last-known address. If upon such initial determination benefits are allowed but the record of the case indicates that a disqualification has been alleged or may exist, benefits shall not be paid prior to the expiration of the period for appeal as hereinbefore provided. If an appeal is duly filed with respect to a matter other than the weekly benefit amount or maximum duration of benefits payable, benefits with respect to the period prior to the final decision of the Board shall be paid only after such decision: Provided, That if an appeal tribunal affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken. If, subsequent to such initial determination, benefits with respect to any week for which a claim has been filed are denied for reasons other than matters included in the initial determination, the claimant shall be promptly notified of the denial and the reasons therefor, and may appeal therefrom in accordance with the procedure herein described for appeals from initial determinations.

(c) To hear and decide appealed claims, the Board shall appoint one or more appeal tribunals to hold hearings in accordance with regulations prescribed by the Board at which all parties shall be given opportunity to present evidence and to be heard. In the conduct of such hearings, the parties shall not be bound by common law or statutory rules of evidence or other technical rules of procedure, but the appeal tribunal shall use due diligence to ascertain the true facts of the case.

Appendix C

State of Tennessee Employment Security Law, Title 50, Chapter 13, Tennessee Code 1955 Annotated

CLAIMS FOR BENEFITS AND APPELLATE PROCEDURE

Filing

Sec. 50-1325. A. Claims for benefits shall be made in accordance with such regulations as the commissioner may prescribe. Each employer shall post and maintain, in places readily accessible to individuals performing services for him, printed statements concerning benefit rights, claim for benefits and such other matters relating to administration of this chapter as the commissioner may by regulation prescribe. Each employer shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits when and if the commissioner may by regulation prescribe. Such printed statements and other materials shall be supplied by the commissioner to each employer without cost to the employer.

Initial Determination

B. A representative designated by the commissioner, and hereinafter referred to as a deputy, shall promptly examine the claim, and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim, or any question involved therein, to an appeals referee, who shall make his determination with respect thereto in accordance with the procedure described in subsection C of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection D, Section 50-1324, the deputy shall promptly transmit his full findings of fact with respect to that subsection

to the commissioner, who, on the basis of the evidence submitted, and such additional evidence as he may require, shall affirm, modify or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection, which shall be deemed the decision of the deputy. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The deputy may, for good cause, reconsider his decision and shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested party within ten (10) calendar days after delivery or mailing of such notification to the last known address of such claimant files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed benefits with respect to the period prior to the final determination of the board of review shall be paid only after such determination.

Provided, that if an appeals referee affirms a decision of the deputy, or the board of review affirms a decision of an appeals referee, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed no employer's account shall be charged with benefits so paid, and the claimant shall be charged with any benefits so paid, and, in the discretion of the commissioner, shall either be liable to have such payments deducted from any future benefits payable to him hereunder, and shall be liable to repay to the commissioner for the Unemployment Compensation Fund, a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided for in subsection B of Section 50-1329 for the collection of past due contributions.

As amended by Ch. 146, L. 1957.

C. Unless such appeal is withdrawn, an appeals referee after affording the parties reasonable opportunity for fair hearing, shall affirm, modify, or set aside the findings of fact and decision of the deputy. The parties shall be duly notified of such referee's decision, together with his reasons therefor, which shall be deemed to be the final decision of the board of review, unless within ten (10) days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection E of this section. In the absence of an appeal to the board of review, the appeals referee may, within thirty (30) days after the date of notification or mailing of such decision, reconsider his decision and shall thereupon promptly notify the claimant and all interested parties of his reconsidered decision and the reasons therefor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, *et al.*,

Appellants,

against

JUDITH JAVA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Interest of *Amicus*

At issue in this case is that provision of the California Unemployment Insurance Code which provides for suspending, when an employer requests a hearing, the payment of unemployment insurance benefits to claimants determined by the administrative agency to be eligible

for such benefits, the suspension continuing until the decision following the hearing. Calif. Unempl. Ins. Code, § 1335. The court below has held that the California statute violates both the federal Social Security Law (42 U.S.C. § 503[a][1]) and the due process clause of the Fourteenth Amendment.

The State of New York, which follows a procedure substantially similar to that of California (New York Labor Law § 598), administers, through its federally approved Unemployment Insurance Law (New York Labor Law §§ 500-635), probably the largest unemployment insurance program in the country. An affirmance of either the statutory or the constitutional holding of the decision below must have a major impact on the New York program. Especially in veiw of the wide scope of the constitutional aspect of the decision below, but even in view of any limiting of that decision to its statutory aspect and to the facts of the case, New York would have to alter the structure of its program in ways which would be detrimental to the sound administration of that program. Accordingly, the State of New York by its Attorney General, files this brief as *amicus curiae* pursuant to Rule 42 (1) of the Revised Rules of this Court urging reversal of the decision below.

Statement

By a statutory scheme typical of unemployment insurance programs throughout the country, California provides for the payment of unemployment insurance benefits to persons unemployed "through no fault of their own". Calif. Unempl. Ins. Cde. § 100; see New York Labor Law § 501.

The program contemplates a scheme of insurance to help workers over the hump of temporary unemployment. It is designed to assist people genuinely attached to the labor

market as demonstrated by their past employment and current job efforts and who, by virtue of the unavailability of suitable work, are unable to secure employment.

By virtue of its having an unemployment insurance program, California is in a position to take advantage of the enactment by Congress of a tax credit plan for states with acceptable unemployment insurance programs. There is a 3.2% tax on payrolls with credit of up to 90% of 3% for contributions made under an approved state law. The federal government then assumes the administrative costs of the state program. Under the present law, the Secretary of Labor must certify payments to the Secretary of the Treasury where the Labor Secretary has approved the state law (42 U.S.C. § 502). All monies in the state unemployment fund are deposited with the Secretary of the Treasury in the Unemployment Trust Fund (42 U.S.C. § 1104[a]).

A state plan, in order to be federally approved, must be "reasonably calculated to insure full payment of unemployment compensation when due" (42 U.S.C. § 503[a][1]) and must include, *inter alia*, the "[o]pportunity for fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied" (42 U.S.C. § 503[a][3]).

The Secretary of Labor is charged with the duty of insuring that the administration of the state law does not result in denying compensation in substantial numbers to people who are entitled to it, and must further see that the state law is administered in substantial compliance with the federal law. If the Secretary finds, after proper administrative proceedings, that benefits are being denied to people entitled to them or that there is otherwise a failure to comply with the law, he may not continue to certify the state program to the Secretary of the Treasury. 42 U.S.C. § 503(b).

Unemployment insurance benefits are paid out of a fund maintained solely by contributions paid into that fund by employers (Calif. Unempl. Ins. Code, Article 3, § 1025; see New York Labor Law, § 550). The state itself is not liable for any contributions to the fund and employees may not contribute to the fund (Calif. Unempl. Ins. Code, § 976;* see N. Y. Labor Law, § 570[6]). Employers are taxed for contributions to the fund at rates which are established by statute. Included as part of the computation is an "experience rating charge" which reflects charges to the employer's reserve account of amounts paid to persons previously employed by the same employer (Calif. Unempl. Ins. Code, Article 3, §§ 1026, 1028; see N. Y. Labor Law, § 581 [1][b][3]). Thus, the amount of benefits paid to a claimant may directly affect the amount the employer is taxed. If it is ultimately found that money has been paid which should not have been paid, that amount is not charged to the separate employer's account but to the balancing account (Calif. Unempl. Ins. Code, §§ 1027, 1032; see N. Y. Labor Law § 577[1][b][4]).

An individual employer's tax rate also depends on the amount contained in the balancing account and when that account goes beneath a certain level the tax rate also rises (Calif. Unempl. Ins. Code, § 976.5(2), see also §§ 977, 978; see N. Y. Labor Law § 577(2)).

In order to receive unemployment insurance benefits a claimant files certain forms setting forth his eligibility for benefits based on his previous work experience and the reason that he is no longer working. A copy of the form is promptly sent to the previous employer who must, within 10 days, return the form and indicate "any facts then known which may affect the claimant's eligibility for benefits" (Calif. Unempl. Ins. Cde. § 1327). If the employer's answer raises an issue as to eligibility, the claim-

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* Employees do contribute to the Disability Fund. Calif. Unempl. Ins. Code, §§ 144, 984.

ant may then be asked to submit further information relating to the reason that he is no longer working for his previous employer. An eligibility interviewer, after speaking with the claimant, and having before him the employer's answers, makes a determination as to the eligibility for benefits.

The employer is then notified of the determination and, if the determination has been that the claimant is eligible, the employer has ten days within which to file an appeal. Although payments have been commenced with the determination, they are suspended if the employer files an appeal and are not resumed until a referee has determined, after an evidentiary hearing, that the original determination was correct.

In the instant case both appellees filed claims and both employers asserted that the appellees were ineligible. In both cases the eligibility interviewers determined the issue in favor of appellees, they were held eligible for benefits and payments were commenced. In both cases the employers, unlike the vast majority of all California employers, challenged the determinations by filing appeals. Payments were then suspended. After the referee hearings, it was determined that the appellee Hudson was eligible for benefits but that the appellee, Java had never been eligible for benefits. The payments already made to Mrs. Java were not recoverable. Mrs. Hudson received retroactive payment for the period during which she was not paid but was eligible.*

Before the hearings were held, appellees sought declaratory and injunctive relief in the District Court for the

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*Overpayments are recoverable in California only if they were the result of fraud, willful misrepresentation or nondisclosure. They may not be recovered if they were received without fault and the recovery would be inequitable. Calif. Unempl. Ins. Code, § 1375. Payments received pursuant to a decision allowing them may not be recovered. Calif. Unempl. Ins. Code, § 1380.

Northern District of California claiming that they were entitled to the payment of benefits during the pendency of the employer appeals. A statutory three-judge District Court was convened and upheld their contention. The Court based its decision both on the opinion of this Court in the case of *Goldberg* v. *Kelly*, 397 U. S. 254 and on the statutory requirement of 42 U.S.C. § 503 (a)(1) that payments be made "when due". After reviewing the process undertaken to determine eligibility, the Court held that payments in California are due at the time the eligibility determination is made (A. 136-37).* It rejected defendants' argument that payments were not due for the further ten-day period during which an employer can appeal pointing out that the Department in fact began payments immediately (A. 137).

The Court then went on to hold that, since "when due" meant due at the point when all the parties had been heard, evidence collected and an adjudication made, "California's provision allowing benefits to be stopped without any pre-termination procedures raises serious due process questions and the continued arrest of payments for a median of seven weeks similarly causes doubt as to whether California's program is 'reasonably calculated to insure full payment of unemployment compensation when due.' 42 U.S.C. § 503 (a)(1)" (A. 137).

The Court found this case to be "indistinguishable" from *Goldberg* v. *Kelly, supra* (A. 138). It rejected any argument that the unemployment insurance claimant is any less needy than the welfare recipient and, in an observation typical of the Court's confusing of the statutory and constitutional grounds for its decision, stated that "the defendants' efforts to distinguish this case from the constitutional reasoning of *Kelly* and *Sniadach* [v. Family Finance Corp., 395 U. S. 337] only serve to point up the

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* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix before this Court.

validity of the statutory grounds argued by plaintiffs" (A. 138). Pointing out that one of the purposes of unemployment insurance is to keep people off welfare, the Court reasoned that since some 5,000 eligible recipients each year in California for a median period of seven weeks and since the average period of unemployment in California is about nine weeks, it is clear that as to these people payments are not made when due (A. 139). The Court concluded:

> "Accordingly, this Court finds Calif. Unempl. Ins. Cde. § 1335 defective on both constitutional and statutory grounds. By not providing for a pre-termination hearing, it runs counter to the principles enunciated in Goldberg v. Kelly Cit., supra and by being applied so as to result in a median seven week delay in payments to claimants who have been found eligible for such payments, the California statute violates the directive of 42 U.S.C. 503 (a) (1)." (A. 139)

POINT I

The state policy suspending payment of unemployment insurance benefits pending resolution of an employer appeal from a decision allowing benefits does not conflict with the federal statutory requirement that payments be made "when due".

In holding California Unemployment Insurance Code § 1335 to be in conflict with 42 U.S.C. § 503(a)(1) the court below relied on two factors. It held first, that payments are "due", and paid, in California when an eligibility interviewer determines that a claimant is eligible for benefits. It found second, that the median seven-week delay in California in disposing of employer appeals means that the state statute is not reasonably calculated to provide for the payment of benefits when they are due. Neither ground supports the decision below. The first takes account only

of one aspect of the entire state unemployment insurance scheme; the second is not a statutory conflict at all, but is, rather, an administrative concern.

Initially, although it was proper for the District Court to hold that California law controls when payments are due in that State, the Court ignored the only applicable provision of that law. While payments are due in California when an eligibility interviewer determines that they are due, another section of the same statute (Calif. Unempl. Ins. Code § 1335) specifically declares that payments are not due when an employer files an appeal. If California law governs the one situation, it also governs the other and, if the applicable statute specifically says that money is not payable, it is incorrect to determine that the statute says that it is payable. The real question is whether the statute which says that payments are not due when an employer files an appeal conflicts with any congressional mandate as to the time when payments must be made. Clearly, there is no specific Congressional directive dealing with the time when payments are due. Moreover, there is substantial evidence indicating that Congress was well aware of the possibility, and did contemplate, a suspension of payments pending resolution of an employer-initiated hearing.

In the first place, the so-called double affirmance clause has been standard in state unemployment insurance statutes since the inception of the unemployment insurance program.* As appellants' brief points out, it was part of a proposed statute circulated through Congress before the federal statute was adopted. Indeed, Congress itself, in

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* A double affirmance clause provides that contested payments shall be made after a hearing officer's affirmance of the agency determination and an appeal board's affirmance of the hearing officer. California has a modified version of this clause in that payments are resumed after the hearing officer's affirmance of eligibility without regard to any further appeal.

enacting the Unemployment Insurance Law for the District of Columbia included a true double affirmance clause. D. C. Code § 46-311(b). Congress, thus, cannot be said to have been unaware of such clauses or to have enacted two inconsistent statutes.

Second, Congress has never enacted, in the years since unemployment insurance was first established, any statute eliminating the double affirmance clause, although § 503 has been amended several times. See *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281, 287.

Third, the Secretary of Labor is required to certify state plans to the Secretary of the Treasury before any payments may be made to states for their programs. 42 U.S.C. § 502. The Secretary has consistently certified state plans containing the double affirmance clause. This interpretation is entitled to great weight. *Zemel* v. *Rusk,* 381 U. S. 85; *Udall* v. *Tallman,* 380 U. S. 1.

Finally, the Court below relied exclusively on 42 U.S.C. § 503(a)(1), the "when due" clause, overlooking the hearing clause itself (42 U.S.C. § 503[a] [3]). That section requires a state to provide for hearings for people whose claims "are denied." The section does not preclude denying benefits, pending review, to persons whose claims are contested during that contest. It clearly does contemplate allowing the State to deny benefits first and then hold the hearing.

The sound policy behind the double affirmance clause fully sustains its conformity with the Congressional mandate that payments be made when due. Unlike any other administrative scheme, unemployment insurance deals directly with the rights not only of the claimant before it and the interest of the public at large, but also with the rights of the claimant's former employer. Funds for the payment of benefits are obtained solely from a tax

on employers. The individual tax rate is based on an "experience rating charge" and depends to a large extent on the amount previously paid to former employees of the same employer. Although payments which were improperly made are not charged to an individual employer's account, they are charged to a so-called balancing account. When that account goes below a certain level, an additional tax is imposed on all employers.

Apart from any constitutional right to standing or to a hearing which this scheme gives to the employer (see Point II, *infra*), it is clear that it was well within the legislative competence to balance the interests involved. The rationale behind this legislative resolution of the problem is well stated in *Abelleira* v. *District Court of Appeals*, 109 P. 2d 942, 952 (Calif. 1941):

> "The legislature recognizing the importance on the one hand of avoiding improvident payments without due consideration of the right thereto, and the danger on the other hand of withholding the payments for long periods through the slow processes of appeal to the Commission and perhaps eventually to the courts, took the middle course. This appeal, ordinarily decided in a short period of time, carries with it a stay. But when the second decision has also been made in favor of the applicants, the benefits begin, with protection, as already noted, for the employer in the event of later reversal. . . ."

In striking this balance, the Legislature must have assumed good faith on the part of all parties, the claimant in making his application, the employer in opposing the payment of benefits, and the agency in reaching its determination. This presumption of good faith is borne out by the fact that most claimants are ruled eligible for payments and that most employers do not protest the payment of benefits. Under these circumstances, it was wholly reasonable for the legislature to provide for some

administrative stay pending review of a contested claim to prevent the improvident expenditure of funds and then determine that most subsequent appeals would probably be unsuccessful and that the principal of prompt payment after the first review would not result in great unwarranted expense and would, by and large, accord swift payment to eligible claimants. Certainly, there is no indication by Congress that it disagrees with those findings.

The present statutory scheme thus provides for the prompt payment of benefits to almost all claimants as soon as they are ruled eligible. There are at least three possible ways in which affirmance of the decision below would undermine the efficacy of that scheme. First, there would be a natural tendency not to resolve issues of eligibility in favor of the claimant in the first instance, as the interviewers did in the cases involving appellees, although such results are unappealed in most cases even when there has been an initial protest. The tendency would be to leave the decision to the referee after a hearing. The second possible undesirable result is that it would be necessary to have evidentiary hearings at which the employer's presence is required before the determination of eligibility can be made. This procedure would necessarily delay all claims and would be in direct conflict with the Congressional and State policy mandating prompt payment where possible. The third result would be that, in those cases in which employers are successful, unrecoverable sums of money will have been paid to the detriment of the program. The present system provides greater incentive for employers to exercise a kind of supervisory interest over the proper running of the insurance program by their ability to appeal findings of eligibility. Yet there is no evidence that they presently abuse this power and, if payments are to be made despite an employer appeal, at least some of the incentive to provide this check would be removed.

The other basic ground for the District Court's holding is that the delay between the time a hearing is requested

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by an employer and the time that the hearing is actually held establishes a conflict between the state and federal statutes. However, the State statute does not refer to time at all. If any delay at all is authorized by the statute (or by the Constitution) then the question of the length of that delay is for administrative solution. There are ample federal administrative procedures for supervising this kind of problem and the problem should in the first instance be dealt with at that level. See 42 U.S.C. § 503(b).* Alternatively, the problem is a legislative one. The Legislature can investigate and determine that its statute is not working as it was contemplated that it would work. It is then for the Legislature to revise the statute, perhaps by setting a maximum time limit for any stay. See e.g., N. Y. Civil Service Law, § 75(3). But it is wholly unreasonable to say that a statute which is silent as to time contemplates a fixed period within which certain action must be taken or that the statute is then out of conformity with the federal law which also does not provide a definite time limit.

POINT II

The suspension of payment of unemployment insurance benefits pending resolution of an employer appeal does not violate the claimant's right to due process of law.

Notwithstanding the fact that it had disposed of the case on statutory grounds, the court below proceeded also to decide that the statute in question violates the appellees' right to due process of law. However, if a statutory disposition can be made of a claim, the constitutional ground should not be reached and should not have been reached by the Court in this case. *King* v. *Smith*, 392 U. S. 309.

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* As we have suggested, *supra*, the "solution" reached by the Court below could be to delay all cases instead of only the relative handful now delayed.

The Court based its constitutional holding on the failure of the California statute to provide for an evidentiary hearing prior to the suspension of benefits, finding the case before it to be "indistinguishable" from the decision of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254. The Court viewed unemployment insurance claimants as being fully as needy as welfare recipients and found, as it had in deciding the statutory claim, that the time lapse between the employer's filing of an appeal and the actual hearing was a denial of due process to claimants of unemployment insurance.

The Court's reliance on *Goldberg* v. *Kelly*, *supra*, is misplaced for a number of reasons. To the extent that it appears to believe that that case heralds an era when no government benefit may be denied before a hearing is held, it overlooks the language of this Court to the contrary in *Goldberg* itself (397 U. S. at 263) and in other cases. See, e.g., *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886; *Bowles* v. *Willingham*, 321 U. S. 503, 520; *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 595-97; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594. See also *Jaeger* v. *Freeman*, 410 F. 2d 528, 531 (5th Cir. 1969); *Medoff* v. *Freeman*, 362 F. 2d 472 (1st Cir. 1966); *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D. C. Cir. 1964); *R. A. Holman & Co.* v. *SEC*, 299 F. 2d 127 (D. C. Cir. 1962), *cert. denied* 370 U. S. 911. See also *DeLong* v. *Hampton*, 422 F. 2d 21 (3rd Cir. 1970); *Madera* v. *Board of Education*, 386 F. 2d 778 (2d Cir. 1968), *cert. denied* 390 U. S. 1028; *Boone* v. *Wyman*, 295 F. Supp. 1143 (S.D.N.Y. 1968), *aff'd* 412 F. 2d 857 (2d Cir. 1969), *cert. denied* 396 U. S. 1024.

As we suggested in Point I, *supra*, if a right to benefits is to vest after any payment is made, then the employer must be accorded the right to a hearing before there can be a determination allowing benefits because of the source of the funds for unemployment insurance. The employer,

no less than the claimant, has a right to due process of law. See *District Unemployment Compensation Board* v. *Wm. Hahn & Co., Inc.*, 399 F. 2d 987 (D. C. Cir. 1968).

Due process in this context certainly means unassailable standing to challenge the result. *Bodinson Mfg. Co.* v. *California Employment Commission*, 109 P. 2d 935 (Cal. 1941). But the ability to challenge must be a meaningful one; that is, it must be available at a time when the action sought to be prevented can still be prevented. Otherwise, the employer has not had the kind of review to which he is entitled.

Indeed, there are state courts which have held the double affirmance clause be a denial of due process to the employer because it provides for payment to claimants even while the employer is seeking judicial review of the allowance of benefits. *Pennsylvania State Chamber of Commerce* v. *Torquato*, 386 Pa. 306, 125 A. 2d 755 (1956), *cert. denied* 352 U. S. 1024; *Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N. W. 87 (1941); *Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N. W. 303 (1941); *State ex rel. Campbell* v. *State*, 57 N. E. 2d 433 (Ind. 1944). The rationale of each of those cases is that to deny the judiciary the right to grant a stay would be to make the administrative process superior to the judicial process and "the controverted issue of claimant's right to be paid compensation would in effect be finally decided and the compensation paid without affording the adverse party any opportunity whatever to obtain a stay of the rights of the respective parties". *Chrysler Corporation* v. *Appeal Board of Michigan Unemployment Compensation Commission*, 301 Mich. 351, 3 N. W. 2d 302 (1942).

On the other hand those courts, including California's, which have upheld the constitutionality of the double affirmance clause against employer challenge (*Abelleira* v. *District Court of Appeal*, 109 P. 2d 942 [Calif. 1941]; *State ex rel. Aikens* v. *Davis*, 45 S. E. 2d 486 [W. Va. 1947];

Abraham v. *VanMeter*, 303 P. 2d 434 [Okla. 1956], *app. dism.* 353 U. S. 944; *Aero Design and Engineering Co.* v. *Oklahoma Employment Security Commission*, 151 F. Supp. 844 [W. D. Okla. 1956], *aff'd* 353 U. S. 943), have done so on the balancing process described above (*supra*, pp. 10-12), which includes the fact that the employer has already had at least one plenary review complying with all of the strictures of due process before payments against his account are resumed. The Court below has removed that one review and has created a situation where, to provide that review, a plenary hearing will have to be afforded in all cases before benefits are allowed. The decision implies that because the employer's position is solicited before the eligibility determination was made, he has adequate opportunity to be heard. This solicitation, which is not even a personal interview, is certainly not the kind of hearing the Court contemplates for claimants who are denied benefits. Certainly, people who will be charged in some way with the payments which are made should also have the opportunity to be heard.

Nor is the third party interest the only distinction between unemployment compensation and welfare. The Court below placed primary reliance on the asserted need of unemployment insurance recipients as equal to the need of welfare recipients. This, however, is not the basis of unemployment insurance. Need, in the *Goldberg* sense, is not a defining characteristic of the class which appellees claim to represent. Whereas, "by hypothesis" (397 U. S. at 261), need is the basis of welfare, it is not relevant to a determination of eligibility for unemployment insurance benefits. Congress specifically mandated this distinction when it rejected any means test of eligibility for unemployment insurance.

The irrelevance of need to eligibility is further evidenced by the fact that the amount of weekly benefits depends strictly on the wages received during the period of em-

ployment and varies directly with the amount of those wages. The higher the previous earnings, the higher the benefits. If there were no previous earnings or they were less than a certain amount, the claimant is not eligible. No account is taken either of the claimant's resources or of his obligations.

Moreover, unemployment insurance is paid for a limited period of time regardless of the further needs of the claimant. It is simply a temporary measure designed, during the hiatus between jobs, to allow the claimant to maintain his standard of living as well as possible. Thus, it is not the general purpose of unemployment to guard against "brutal need." *Goldberg* v. *Kelly, supra,* at 261.

Accordingly, while the unique nature of welfare made it a matter of due process to allow no interruption of payments to possibly eligible recipients, no such due process right attaches in unemployment insurance. That is governed by the general rule that the Legislature can adopt the means most reasonably calculated to protect the rights of all parties. Moreover, if any delay is constitutionally permissible between the allowance of benefits and their payment then the length of the delay which actually exists in a given state is no more a matter of due process than it is of statutory interpretation. The question is, as we have said, one for regulation by federal or state administrative agencies or by state courts (*supra,* p. 12).

The inappropriateness of the constitutional holding below is vividly illustrated by the wholly unwarranted ramifications of that holding, ramifications which are not speculative but which already have borne fruit in at least one subsequent decision and several pending lawsuits. Thus, a single District Judge in California has held, based on the decision below and on *Goldberg* v. *Kelly, supra,* that a recipient of unemployment insurance who was determined by the agency itself to have "precluded an offer of suitable work" and who was then declared ineligible for benefits for

ten weeks is also entitled to a full hearing before payments can be stopped. *Crow* v. *California Department of Human Resources,* Case No. C-70 1128 ACW (N. D. Calif, Oct. 12, 1970). This position is basically inconsistent with the instant case which relies on the ability of the agency to make a valid determination of eligibility to vest the right to payments in the first place. No explanation is given of why an agency which can declare someone eligible for benefits cannot also make a finding of ineligibility. Certainly the nature of the investigation conducted to make the finding of ineligibility is no less thorough than the investigation to determine eligibility.

In New York, a suit has been filed claiming that the agency which once determined a person eligible for benefits cannot, without a prior hearing, redetermine that that person was never eligible for benefits and further claiming that a person who has been found eligible for benefits may not, without a hearing be found ineligible for any subsequent benefits during a period when he is determined to be unavailable for employment. *Torres and Dinger* v. *New York State Department of Labor,* 70 Civ. 2408 (S.D.N.Y.). In *Torres,* too, the plaintiffs rely on *Goldberg* v. *Kelly, supra,* and on the decision below. A three judge court has been convened, largely on the strength of those cases, and the case is presently *sub judice.*

Thus, *Goldberg* v. *Kelly, supra,* and the decision below are being used as the basis for seeking restructuring of the entire unemployment insurance scheme. The logical outcome of these progeny will not only require hearings before payments can be stayed pending an employer appeal, as in the decision below, but will require hearings before the agency itself can make a determination based on its own findings whether the question involved is one of initial eligibility or of the week-by-week eligibility of each claimant which is an integral part of the unemployment insurance structure. For, again unlike welfare, un-

employment insurance is paid on a weekly basis for the past week and there is no presumption of continuing eligibility. Indeed, eligibility is maintained only on a showing that the claimant has made every reasonable effort to find work in the past week and has been unable to do so. Calif. Unempl. Ins. Cde. § 100. The disruption in the orderly process of evaluating each claimant weekly would be enormous and the amount of money which would have to be paid in these circumstances would likewise be enormous.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Dated: New York, New York, December 9, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 507

California Department of Human Resources Development; Gilbert Sheffield as Director of the California Department of Human Resources Development, et al.,

Appellants,

vs.

Judith Java, et al.,

Appellees.

Appeal from Decision of the United States District Court for the Northern District of California

BRIEF ON MERITS OF THE STATE OF OHIO AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

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BRIEF ON MERITS OF THE STATE OF OHIO AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA

I

Introduction and Interest of Amicus Curiae

This brief is presented on behalf of the State of Ohio, Bureau of Employment Services, which administers an unemployment insurance program through its federally approved Unemployment Compensation Law, Sections 4141.01 through 4141.46, inclusive, of the Ohio Revised Code.

The decision of the lower Federal Court if upheld would adversely and severely affect the administration of the unemployment compensation within the State of Ohio.

Presentation of this brief is authorized and filed pursuant to Rule 42(1) of the Revised Rules of the Supreme Court of the United States.

II

Statement

Appellees are citizens of the State of California who were initially declared eligible for unemployment benefits in the State of California. Their employers subsequently appealed their determinations of eligibility pursuant to California Law, and benefits were thereafter withheld pending a decision in their employer's appeal. A three (3) Judge District Federal Court in the Northern District of California granted a preliminary injunction finding that Section 1335 of the California Unemployment Insurance Code, was lacking in both constitutional and statutory areas, because it did not allow for an adversary proceeding prior to the termination of unemployment benefits.

The District Federal Court further ruled that the California statute did not provide or insure for full payment of benefits when due and was, therefore, not consistent with or in compliance with Section 503(a)(1) of Title 42, U.S.C. of the Social Security Act of 1935, as amended; and the due process ruling as set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

III

Questions Presented

The questions presented in the instant case are as follows.

1. When a claimant, initially declared eligible for un-

employment benefits has an appeal filed against her by her last employer on the determination of eligibility, does the process of staying payment of further benefits until a decision is reached in the employer's appeal deprive the claimant of due process?

2. After a claimant initially declared eligible for unemployment benefits, has an appeal filed against her by her last employer in regard to the determination of eligibility, in 42 U.C.S., Section 503(a)(1), in which a state's procedure must insure full payment of benefits "when due", satisfied by the process of allowing payments to be made only after a final determination of an employer's appeal?

3. Can a federal district court rule a state statute unconstitutional, and totally invalid when the constitutionality of a state statute can be presumably constitutional and valid in a certain given fact situation?

IV

Summary of the Argument

Under Ohio Law, Section 4141.28 (G), Ohio Revised Code, after a claimant has been determined eligible by the Administrator or one of his deputies, an employer may file within ten (10) days an appeal of the determination of eligibility. This must be in writing for a reconsideration to be rendered by the Administrator. During the period in which the determination is being reconsidered, payment of future benefits affected by such appeal are withheld pending the decision upon reconsideration. If the request for reconsideration is filed within the ten-day period, the Administrator must promptly reconsider such request and issue his decision to all interested parties.

If an employer loses his request for reconsideration, he may then appeal such decision on reconsideration to the Board of Review within ten (10) calendar days after

notification. Payment of benefits in dispute are again withheld pending the decision on appeal to the Board of Review. If the claimant wins at the Board of Review level, payments shall forthwith be commenced. If a claimant loses, payments are not allowed or paid, and the employer's account will not be charged.

The Federal District Court below has ruled that this process of withholding benefit payments while an appeal has been filed and is being decided violates the due process clause of the United States Constitution.

The Federal District Court below also ruled that this process of withholding benefit payments during appeal did not comply with the prerequisites in 42 U.S.C. Section 503(a)(1) permitting federal involvement only when the state involvement insures full payment of benefits "when due".

The Ohio Law, Section 4141.28 (B) (1), Ohio Revised Code, provides that when an unemployed individual files an application for determination of benefit rights, his last prior employer shall be immediately notified, and must file with the Bureau of Employment Services within ten (10) days from the date of such notice, the reason for separation, wage and other necessary information that may be considered in determining the applicant's rights to benefits. If an employer fails to deliver such information to the Administrator within the ten (10) day period, then if necessary to insure prompt payment of benefits "when due", the Administrator may make his initial determination, and may base such determination on that information as is available to him which can include the applicant's own statements. Such determination as it relates to a claimant's determination of benefit rights can be amended within one year, or upon subsequent correct wage and other necessary information received from the employer.

The Federal District Court below also found that a delay of several weeks in the instant case violated due process and thereby violated the Californa Statute in its entirety. In Ohio the basic concept of preserving the constitutionality of a statute is of the utmost importance.

In making its ruling the Federal District Court below also found that the instant case must follow the controlling elements of *Goldberg v. Kelly*, 397 U.S. 254 (1970). It is the State of Ohio's basic contention that the *Goldberg v. Kelly* case is definitely distinguishable for various reasons.

Since the Ohio statutory laws pertaining to the questions presented by this appeal are similar to those of California, it is the State of Ohio's desire to see that the Federal District Court's rulings are reversed upon the basis of a complicated and harsh interpretation of the law, which will adversely affect the administration of the Ohio Unemployment Compensation Program.

The basis of the State of Ohio's arguments are first that there was no denial of due process in suspending payments of benefits while there is an appeal filed by an employer against a claimant initially determined to have been eligible for benefits, on the basis that employer's rights are equal to, if not superior to claimant's rights since the employer normally foots the bill through taxation for any unemployment benefits paid. Secondly, that insuring payments of benefits "when due" pursuant to 42 U.S.C. Section 503(a)(1) means that payments of benefits are "due" only when a final determination has been rendered that a claimant is actually eligible for said payment of benefits, and not when a claimant initially makes application for benefits. Thirdly, federal courts should uphold the constitutionality of a state statute whenever possible within a certain fact situation.

V

Argument

1. A Claimant Declared Initially Eligible for Unemployment Benefits, and Who Has an Appeal Filed by His Last Employer on the Determination of Eligibility, and Where Payment of Benefits is Stayed Until the Appeal Has Reached a Finality, is Not Deprived of Procedural Due Process of Law.

The due process clause reads: "nor . . . deprive any person of life, liberty or property without due process of law."

In *Joint Anti-Fascist Refugee Committee v. McGrath*, U.S. Const. Amend. V & XIV, Sec. 1, 341 U.S. 123 (1951) (3) Justice Frankfruter said:

> "Whether the . . . procedure . . . observed 'the rudiments of fair play . . .' cannot be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

Perhaps an analysis of due process and its relevance to unemployment compensation can best be seen in previous judicial interpretation of its applicability to non-unemployment compensation cases.

Consider the circumstances of summary administrative action without the safeguards of adequate due process protection in numerous instances. In *North American Cold Storage Company v. City of Chicago*, 211 US 306 (1908)), official confiscated from the plaintiff's warehouse a vast supply of poultry alleging that it was infected or decayed food; however, before the plaintiff was

informed of said action, the poultry was destroyed. The Court upheld the action of the city officials when it stated:

> "Provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use *is not necessary*. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants." (See also Davis, Administrative Law Tex Sec. 7.08 at P. 123 (1959).

In *Bowles v. Wellingham,* 321 U.S. 503 (1944), and *Yakus v. United States,* 321 U.S. 4141 (1944) legality of a portion of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. Sections 901-46 (1964) was questioned. The Government was given the power to set maximum rents and prices without giving any affected individual a prior hearing. The Court in approving this procedure stated:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate . . . delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

Currently, many courts are swamped with litigation concerning the question of whether due process requires that a welfare recipient be given the opportunity for a hearing prior to discontinuation of relief payments.

The most recent analysis of this problem appears in *Goldberg v. Kelly* where Justice Brennan, writing for the five man majority declares that procedural due process under the Fourteenth Amendment requires that welfare recipients be afforded an evidentiary hearing before termination of benefits by welfare authorities. Perhaps a short synopsis of the factual setting will make an examination of the case more meaningful.

This action was brought by residents of New York City receiving financial aid under AFDC (Aid to Families with Dependent Children) or under the Home Relief Program. They alleged that the officials who were administering these programs terminated them without prior notice. The City of New York elected to institute a local procedure providing the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date and also that said recipient may have the proposal of termination reviewed by a supervisor or the official who approved the termination or suspension. During this review the recipient may submit written statements. This decision must be made expeditiously to the recipient. The challenge to this procedure comes over the absence of any stipulation for personal appearance by the recipient before the reviewing official or confrontation and cross examination of the adverse witnesses. Although a post termination fair hearing is provided with all the due process safeguards, it is the interim where payments are terminated before this post termination fair hearing, that appellees allege severe hampering of their rights.

However, Justice Brennan *distinguishes welfare recipients from any one else benefiting from a government largess* when he states:

> "Thus the crucial factor in this context—a factor not present in the case of the black listed government contractor, the discharged government employee, the taxpayer denied a tax exemption or virtually anyone else *whose governmental largess is ended*—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."

Unlike the welfare recipient, the unemployed worker is not by definition cast into dire poverty but often has

sufficient resources to sustain himself until his appeal of the termination or suspension of benefits can be perfected.

Another argument raised by the state government in *Goldberg* when arguing on behalf of the state's interest to preserve its public fund and again reiterated in *Java* was the contervailing governmental interest in conserving fiscal and administrative resources. These interests justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted *without challenge*, summary adjudication also conserves both administrative time and energy by reducing the number of evidentiary hearings actually held.

Justice Black in his dissent in *Goldberg* outlined a harsh repercussion of this decision when he assessed the possibility of the state agency being slower to place a needy individual on relief:

"This, the end result of today's decision may well be that the Government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including of course, the opportunity to present his case to this Court. Since the process will usually ental a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the Government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility."

Another attack at the majority opinion leveled by Justice Black was that this newly required procedure has no precedent in our legal system. He went on to state:

> "Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship which requires one party to make periodic payments to the other. Often the situation arises where the party 'owing' the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument . . . These recipients are by definition too poor to post a bond or to repay the benefits which, as the majority assumes, must be spent as received to insure survival."

Consequently, one can see that even in the welfare area, where due process has been making successful inroads, its application still leaves some rough spots that need additional attention before it can turn to unemployment compensation.

Appellees argue that no one may be deprived of property by state action unless first given notice and an opportunity to be heard. They then argue that they are entitled to receive unemployment compensation benefits even though their right to such benefits is being contested by the employer, the party who is ultimately paying for such benefits. What the appellees fail to realize is that an employee does not have an inherent right to receive unemployment compensation, unless he is eligible thereto in all respects under the statute. The determination of eligibility is by its very nature an adversary proceeding if the employer contests such eligi-

bility. The final determination of eligibility is not made until the administrative procedure has been exhausted. It is only when that final determination of eligibility has been made that the *right* vests in the employee. He then receives benefits for the entire period in which he was eligible to receive them, both retroactively and prospectively. To hold that the employee is vested with the right to benefits upon the initial determination of eligibility in a local office, which initial determination is made on the basis of *ex parte* statements by the employee and the employer, would in effect deprive the employers of property while denying them due process of law. The employer, no less than the claimant, has a right to due process of law. See *District Unemployment Compensation Board v. Wm. Hahn & Co., Inc.*, 399 F2d 987 (D.C. Cir. 1968).

A close reading of *Goldberg v. Kelly* reveals the Court's repeated references to the "uniqueness" of the determination of welfare benefits and the overpowering social consideration in providing prompt payment of benefits to persons who are destitute, without funds or assets of any description. The Court found the need of the poor to be of greater significance than the relatively small cost to the *general public* occurring from the erroneous determination of benefits. However, it is significant that the Court notes, at 25 L. Ed. 2d 296, that:

> "It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing."

Your amicus curiae submits that the Court was acknowledging the constitutionality of procedures such as those in the present case. See *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 wherein the Supreme Court stated that the existence of "constitutional re-

straints" on dealing with public employees (*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)) did not require *notice of any hearing* for an employee before terminating his employment. 376 U.S. at 898.

Unlike the situation in *Goldberg v. Kelly*, the court in this case must balance the right of a small class of eligible employees against the rights of a small class of amenable employers. Public funds created by tax dollars from the general public are not being depleted, such as in welfare; but instead a special fund created by premiums from a special class would be affected by plaintiff's proposal. Millions of dollars would be paid by this special class to a relatively small number of employees, many of whom may not even be entitled to benefits. Unlike welfare recipients most employees seeking unemployment compensation are not destitute or without funds. Included in their number would be a myriad of seasonal workers, high salaried laborers, engineers, teachers, wives of working husbands, and other persons who have either savings or supplemental earnings. As pointed out before in this brief, benefits are paid only to those persons who have been employed for a certain period of time and who become unemployed through no fault of their own.

Due process is not a concept which demands that this Court invalidate carefully conceived administrative procedures which require reasonable time intervals for the determination of eligibility. The requirements of due process necessarily vary with the type of proceeding involved, *Hannah v. Larche*, 363 U.S. 420, 440, and cannot be equated with inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers' Local 473 v. McElroy*, 367 U.S. 886, 895. In each case the nature of the alleged right, the nature of the proceedings, and the possible burden on that pro-

ceeding, are all relevant considerations. *Hannah v. Larche, op. cit.* at 442.

In this case the interest of the relatively small number of employees whose initial determination of eligibility is appealed is more than offset by the interest of others. The State of Ohio is interested in maintaining an unemployment compensation system under which the greatest number of unemployed persons can begin to receive benefits immediately upon request without the delay and expense occasioned by the necessity of a true adversary hearing. Further, the State is interested in seeing that benefits are not paid to any person who is not entitled to them. The interests of Ohio employers coincide with those of the State on the two aforementioned points, and in addition the employers are interested in keeping their contributions to the Ohio Unemployment Compensation Fund as low as possible when they have a record of no or few layoffs. Under the plan suggested by plaintiff an employer's contributions to the fund would be increased irrespective of his highly successful and desirable full employment record.

2. When a Claimant is Initially Declared Eligible for Unemployment Benefits, Has an Appeal Filed Against Her by Her Last Employer in Regard to the Determination of Eligibility, the Process of Allowing Payment of the Benefits to be Made Only After a Final Determination of the Employer's Appeal is in Compliance With and Satisfies 42 U.S.C. Section 503(a)(1) Which Calls for a State's Procedure to Insure Full Payment of Benefits "When Due".

The Ohio unemployment compensation purpose is in compliance with the Federal Social Security Act as to insuring payments of benefits "when due".

State unemployment insurance is authorized and controlled by the Federal Unemployment Compensation Act which is included in the Social Security Act of 1935. Section 503(a)(1) of the Act provides in part:

> "(a) The Secretary of Labor shall make no certification for payment (of federal funds for administration of state unemployment statutes) to any state unless he finds that the law of such state, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—"(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."

There are three essential purposes which underlie the Federal Act: to stabilize consumer demand and business in the crucial incipient stages of economic depression; to provide compensation for a short period of time while the unemployed worker seeks reemployment; and to prevent the worker from having to resort to public assistance such as welfare. See *S. Rep.* No. 628, 74th Cong. 1st Sess. 10-13 (1935)); *H.R. Rep.* No. 615, 74th Cong.; 1st Sess. 7-9 (1935).

Keeping the above introductory notes in mind, the author will, in the remainder of this brief, survey the much litigated field of welfare, evaluate relevant decisions and present the Court with some comparisons when considering the applicability of a fair hearing before unemployment compensation benefits are suspended.

One might argue that this action is also unconstitutional under the equal protection clause of the Fourteenth Amendment. Both employers and employees are entitled to appeal the Departmental eligibility determinations if they are not satisfied. Section 4141.28 (G), Ohio Revised Code.

A more sensible interpretation is that payments are "due" only when both sides have had an opportunity to be heard. At the initial interview generally only the claimant is present; he presents his version of the facts and may bring witnesses and documents to support his claim. The employer, often preoccupied with business and having no prior notice of the interview, does not appear. He is usually contacted and must supply within ten (10) days wage and other necessary information. Section 4141.28 (B) (1), Ohio Revised Code. Following the determination, the employer is informed of the decision and may then appeal. Until this time only the claimant has had a more advantageous opportunity to present his case; the employer has not, as a practical matter the employer has not had an opportunity to exercise his right to be heard. To carry this analysis one step further, continuing payments during the pendency of an employer's appeal would prematurely deprive the employer of his property before a finality in his right to be heard, since generally such payments are unrecoverable by the state or the employer. Consequently, this can amount to an adjudication, before the employer has had a meaningful chance to present his case. To force payments during an appeal would substantially dilute the employer's right to be heard. *Babb v. Bullitt*, 310 Ky. 211, 220 SW 2, 394 (1949). An application for benefits involves not only the claimant, the state, but those private employers who fund the unemployment compensation program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) who are required to make contributions into an unemployment fund to pay benefits. The State does not have the direct interest as it has in a welfare situation, where every dollar the states save may be available for other programs which

also may compete for Federal funds. With unemployment compensation, the State is basically neutral since it cannot use the unemployment compensation fund for any other state purpose but must simply insure that sufficient money is available in the fund to pay all unemployment claims. Consequently, the state may be looked upon as a fiduciary in administrating the unemployment compensation fund. The real parties in interest are the private employers who may be required to pay more into the fund if the *Goldberg* ruling is applied in the area of unemployment compensation.

Therefore, it seems that payments are "due" only when a final determination setting forth eligibility would have been reached. When such a determination or ruling has become final, then the benefits could be said to be "owing" to an eligible claimant. *Peoples v. Buckles*, 57 Cal. App. 2d 76, 79 (1943); *Fesser v. Fesser*, 93 Md. 716, 50A 406 (1901); Cf. *Joyce v. Scott*, 265 F. 2d 369, 371-372 (1959); *In re Ingersoll Co.*, 148 F. 2d 282, 284, (1945).

If there is an appeal at the first level by an employer, after a claimant has been initially determined to be eligible for benefits, this appeal should be enough to overcome the initial determination and to allow benefits to be stayed until a decision is rendered on the appeal. If the initial determination is reaffirmed after a subsequent appeal to the Board of Review, as would be the case in Ohio from a decision on reconsideration by the Administrator, then is this to be construed as sufficient cause for starting and continuing payments, notwithstanding the fact that further appeals may take place? This appellant thinks not. At this point, we cannot be sure that the Constitution forces payments to be made even at this point or level of appeal. *Pennsylvania Chamber of Commerce v. Torquato*, 386 Pa. 306, 125 A. 2d 755, 767

(1956); Cert. Denied, 352 U.S. 1024; *Chrysler Corp. v. Appeal Board of Michigan Unemployment Comp. Commission*, 301 Mich. 351, 3 NW 2d 302 (1942); *State ex rel. Campbell v. State*, 223 Ind. App. 59, 75 N.E. (2d) 433, (1944); *Dallas Fuel v. Horne*, 230 Iowa 1148, 300 NW 303 (1941).

In effect, the most that appellees could establish is that after the initial determination favorable to them they have what might be termed an inchoate right. The right will become vested, so to speak, if the employer does not file an appeal or, in the event of such an appeal, the Referee affirms the initial determination.

This timing represents a considered effort by the Ohio General Assembly to minimize the possibility of improvident payment. The initial procedure for determining whether a claimant is eligible for benefits does not amount to a full scale investigation nor does it remotely resemble a hearing at which the employer may fully air his views. At this preliminary stage no testimony is taken under oath, there is no right to confrontation, right to call witnesses, etc. For this reason the Ohio Legislature has decreed that the initial determination that a claimant is entitled to benefits is not sufficient, standing alone, to justify immediate payment of those benefits. For that matter, a decision of a referee reversing an initial denial of benefits is treated in similar fashion, i.e., standing alone, a referee's decision awarding benefits following an initial denial is not deemed sufficient to justify an immediate payment of benefits. However, in the judgment of the Ohio General Assembly the risk of unwarranted and improper benefit payments is so reduced by the agreement of the Board of Review and the referee that a claimant is eligible, that upon such concurrence benefits may reasonably be considered "due". Hence, at that point benefits commence immediately,

despite the possibility that a later court decision may eventually result in a ruling that the claimant is in fact ineligible.

The administrative procedures followed with respect to unemployment benefits in Ohio are designed to accord the swiftest possible payment to the vast majority of claimants. In developing an unemployment compensation program, the Ohio General Assembly was faced with two possible procedures. It could provide for prompt initial determinations of claims followed by prompt payment which, in the great bulk of cases would be unreviewed. In the alternative, it could provide for full-scale hearings before benefits were either allowed or denied and thereby delay all payments. On balance, it seemed more sensible, and more just, to make a rapid determination on the available evidence with the safety valve of redetermination and/or appeal. The adoption of the first alternative was designed to help claimants, not to hurt them. Indeed, it is greatly to be doubted that many members of the class which appellees claim to represent would support them in this delay and it is ironic that appellees obviously would find no objection to the slower, more cumbersome method of pre-determination hearings. Certainly they do not claim that a hearing is required before a person can be declared ineligible for benefits if he has never been paid.

Parenthetically, we might note that the determination concerning when payments from the state are "due" is one properly to be made by the Secretary of Labor and appellees' argument in this regard should be directed at him. The Secretary of Labor has certified the Ohio plan and, to your amicus curiae's knowledge, the plans of 48 other states which have provisions similar to the section being examined here. Implicit in his certification is a finding by him that benefits are in fact paid by the state "when due". The Secretary is presumed to have

acted correctly. Appellees' arguments that payments are not being made "when due" are supported neither by the administrative findings of the Secretary of Labor nor by the commonly accepted legal meaning of the subject term.

Appellees' contention is that California is not in conformity with the requirements of Section 503 (a) (3) of the Social Security Act, which provides that the Secretary shall make no certification unless he finds that the state provides for "(3) Opportunity for a fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied." The argument is that staying benefits pending an appeal violates this provision. The argument has no merit.

First, the claims for benefits in the instant case have both been *granted*, not denied. Note that the language of the Federal Statute refers to "claims" which have been denied. It does not refer to a policy of withholding benefits after a claim has been granted. It would make absolutely no sense to believe that Congress intended that a state must provide a full scale hearing upon an applicant's first application for benefits. It is inconceivable that Congress would have intended that the State of Ohio should provide a full scale hearing in the thousands of unemployment insurance claims which were filed in this state.

The sensible interpretation of Section 503(a)(3) of the Social Security Act is that portion which requires an opportunity for a fair hearing for individuals whose claims are "denied" should be construed as meaning "are *finally* denied." This means that a claimant who applies for unemployment insurance benefits will receive initially an administrative determination concerning his eligibility. If his claim is denied, he then has an opportunity to appeal and the denial is not considered final until he has had an opportunity for a fair hearing before a ref-

eree. On the other hand, if the claim is initially granted at the administrative level, the employer is given the right to appeal that determination because he is the one whose money pays the claimant's benefits.

3. A Federal Court Should Save and Preserve the Constitutionality of a Statute Wherever Possible.

In our court system today, it seems that there is a strong presumption in favor of upholding the validity of a statute's constitutionality whenever possible under any given fact situation. This presumption stems from the basic philosophy and principal of statutory construction in that a statute should be saved whenever possible and not destroyed. *Labor Board v. Jones and Laughlin*, 301 U.S. 1, 30 (1937); *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Epstein v. Helvering*, 120 F. 2d 427 (1941).

The United States Supreme Court has set forth the principal, stating:

> "It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose." *Communications Association v. Donds;* 339 U.S. 382, 407 (1950); See also *Antilles Surveys Inc. v. DeJongh*, 358 F. 2d 787; Cert. denied, 385 U.S. 900 (1966)

The delay in our instant case, a delay of only several weeks, is not so unreasonable as was the delay in the *Goldberg* case, a delay of nearly four (4) months. The Court should take into consideration the huge proportion of cases and claims handled by the average State Unemployment Agency. The Federal Court below could have saved the constitutionality of the state statute involved by taking the fact situation into consideration, and perhaps could have given the unemployment department or agency a guideline to follow in processing claims so as not to delay them any longer than necessary.

VI

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Honorable United States Supreme Court should reverse the decision of the Federal District Court below.

Dated: December 9, 1970

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Certification

A copy of this Brief on Merits of the State of Ohio as Amicus Curiae in Support of the State of California Department of Human Resources Development, et al., in the subject case now pending in the United States Supreme Court, has been forwarded by Air Mail Special Delivery to Mr. James M. Klein, Attorney-at-Law, Contra Costra Legal Services Foundation, 431 Sixth Street, Richmond, California 94801, Attorney for Appellees, and to Mr. Asher Rubin, Deputy Attorney General, Department of Justice, State Building, San Francisco, California 94102, Attorney for Appellants, this 9th day of December, 1970.

FRANKLIN R. WRIGHT
Assistant Attorney General

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IN THE

Supreme Court of the United States

October Term, 1970
No. 507

JUDITH JAVA, *et al.*,

Appellees,

vs.

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, *et al.*,

Appellants.

Brief of Southern California Edison Company, et al. as Amici Curiae.

Interest of the Amici Curiae.

Southern California Edison Company, California Metal Enameling Company, Transit Mixed Concrete Company, American Cement Corporation, West Coast Chain Manufacturing Company, and Occidental Life Insurance Company (hereinafter the "Employers") moved unsuccessfully for leave to intervene as defendants in this Court in order that they might participate as formal parties in the appeal and subsequent proceedings in this cause. The formal motion to intervene and the attached affidavits submitted by each company set forth in detail the substantial interest which the Employers, and other California employers, have in this litigation. Because that material is of such significance to the Employers' position in this case, and because it forms the background for the

Employers' brief as *amici curiae*, a portion of that material is reiterated here.

The six *amici curiae* are employers within the State of California, and as such, are subject to the taxing provisions of the California Unemployment Insurance Code. The unemployment insurance taxes paid by employers constitute almost the sole source of income collected in the Unemployment Fund, from which unemployment benefits are disbursed to qualified claimants. Employers have a substantial interest in seeing that excessive amounts are not disbursed from the Fund, for as benefits increase, the employers' unemployment taxes also increase. Section 1328 of the Code provides employers with a procedure for testing the propriety of disbursements by granting an employer the right to challenge the Department's initial determination to pay benefits to a former employee whom the employer believes is ineligible. Section 1335 provides in part that if such an appeal is filed by the employer, the payment of benefits will be suspended pending a final decision on the appeal.[1] The District Court has enjoined the enforcement of that Section, holding that the lack

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[1] "§1335. *Appeal precluding benefit payments; exceptions.* If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:

"(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issues set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or

"(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

of a pre-termination hearing renders the Section constitutionally defective and violates the directive in 42 U.S.C. Section 503(a)(1) that the unemployment insurance program be "reasonably calculated to insure full payment of unemployment compensation when due."

The Employers' interest in this case centers around the substantial financial effect which a decision upholding the District Court's invalidation of Section 1335 could have upon all employers within the state.[2] The affidavits of the Employers attached as Exhibits B through G to the Motion to Intervene demonstrated that should disbursements from the Fund significantly increase, a result which necessarily follows from the District Court's decision, employers could be required to pay taxes based upon a higher taxable wage base and under a higher tax schedule. If both of these bases for computing the Employers' tax rates had been operative in 1969, the Employers' unemployment taxes would have shown an increase over taxes actually paid in 1969 in these amounts: Southern California Edison Co.—93.3%; California Metal Enameling Co.—31.3%; Transit Mixed Concrete Co.—53.2%; American Cement Corp.—62.1%; West Coast Chain Manufacturing Co.—66.8%; Occidental Life Insurance Co. —35.2%.

These figures represent the possible increased financial burden on employers which may result when an increase in disbursements from the Fund causes certain elements in the financing structure for unemploy-

[2]The Court's decision will affect employers across the country; statutory provisions similar to California's Section 1335 are in effect in 48 other states. See Appellant's Jurisdictional Statement at 15-17.

ment insurance to become effective. One of these elements is the taxable wage base (Unemployment Insurance Code Section 930). Whenever total revenues to the Unemployment Fund equal or exceed disbursements, employers pay taxes at the assigned rates on the first $3,800 of each employee's annual earnings. When revenues fall short of disbursements, however, employers pay taxes on the first $4,100 of each employee's wages. Thus, at the average 1969 tax rate of 2.51%, a company would pay a per employee tax ranging from $95.38 to $102.91, depending on the relationship of fund income to outgo.

The second is the balancing account tax (Section 976.5 of the Code). Charges to the balancing account include benefit payments not charged to individual employer's accounts, extended duration payments, and benefits charged against deficit accounts. Credits to the balancing account come mainly from uniform taxes levied on all employers and interest earned by the unemployment funds. The tax rate depends upon the relationship between charges to the account and its credits and ranges from a high of 1.0% to a low of 0.2%. An employer who was not responsible for any charges against the balancing account could be assessed for per employee charges of as much as $41 or as little as $7.60, depending upon the relationship of account charges to credits.

The third element concerns the two experience rating tax schedules (Sections 977 and 978 of the Code). Under these variable schedules, employers are taxed in relation to their experience with unemployment; however, the factor governing the operative schedule is the relationship of the Unemployment Fund to total taxable wages in the state. The high tax schedule is designed

to produce more revenue than the low, so employers with excellent experience pay more taxes whenever the high tax schedule is in effect. For example, an employer with the optimum reserve account ratio would pay at the rate of 0.8% when the high schedule is in effect; under the low schedule, he would be assigned a zero rate.

In their Brief in Opposition to the Employers' Motion to Intervene, the appellees attempted to minimize the financial effect which the District Court's ruling could have on California employers. The Employers submit, first, that an increase in disbursements of $800,000 is not an insignificant amount.[3] Secondly, that argument ignored the broader ramifications of the Court's decision. The Appellees based their conclusions upon the premise that the number of employer appeals and the median six-week delay from appeal to decision will remain constant. In fact, however, those factors are likely to change significantly. It is not speculative to conclude that the number of fraudulent claims will increase as a result of the District Court's

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[3]Payments made to claimants during employer appeals but which are later found to have been improperly made are essentially unrecoverable. Sections 1375-1380 of the Code provide procedures for the recovery of an overpayment, but from a practical standpoint recovery is difficult. Section 1375 is a significant roadblock to recoupment, since it provides that the recipient will be liable for an overpayment unless:

> "(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and
>
> "(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

The difficulties inherent in attempting to prove malfeasance on the part of the recipient, or that recovery would not be against equity and good conscience, and the administrative costs of a proceeding to establish an overpayment militate against the state seeking recovery at all.

decision. Individuals who would not have even applied for unemployment compensation in the past could now seek and on the basis of untrue assertions receive benefits pending an employer appeal. The delay in appeal time caused by these fraudulent claims would of necessity increase concomitantly. A substantial financial impact on employers within the state is clearly within the range of reasonable probability.

This direct financial impact serves to illustrate that employers within the state, rather than the state itself, are the real parties in interest in this litigation. In essence, the state merely serves as an administrator of private funds, disbursing sums from an account completely segregated from ordinary tax revenue. Employers are therefore interested in this litigation, not to assert that qualified claimants should be denied benefits, but to ensure that the employer's unique financial interest is adequately protected. As will be more fully discussed subsequently, the Employers maintain that in weighing whether a claimant has been denied due process of law, the employer's right to due process in the proper administration of his unemployment contributions must also be weighed. Any decision touching upon the right to receive benefits must therefore also include consideration of the employer's right to contest improper disbursements. This brief is filed to present those considerations, and to urge the Court to hold that since the District Court's decision did not take cognizance of the employer's interest, the lower Court's decision should be reversed or at least remanded for further consideration.

ARGUMENT.

I.

The Suspension of Unemployment Insurance Benefits Pending an Employer's Appeal Is Not Violative of Due Process Under the Fourteenth Amendment.

In *Goldberg v. Kelly* (1970), 397 U.S. 254, 25 L. Ed. 287, the Court held that the termination of public assistance payments without offering an evidentiary hearing prior to termination denied the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. In the instant case, the lower Court concluded that Section 1335 of the California Unemployment Insurance Code, which provides that unemployment benefits will not be paid pending an employer's challenge to the initial determination of eligibility, presented a case indistinguishable from *Goldberg*. The Court held that by not providing for a pre-termination hearing, Section 1335 was constitutionally defective and counter to the principles enunciated in *Goldberg*.

The Employers assert that even if it is assumed that Section 1335 "terminates" payments, the decision in *Goldberg* is not dispositive of this case. The principles in *Goldberg* should be restricted to the context of public assistance payments. Unemployment insurance is significantly different from welfare; a decision which affects one should not *ipso facto* affect the other. Thus, in testing whether a procedure under the unemployment insurance structure is constitutionally sufficient, that procedure must be examined in its own light sep-

arate and apart from procedures applicable to any other governmental function. As the Court stated in *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Communications Comm'n v. WJR*, 337 U.S. 265, 275-276; *Hannah v. Larche*, 363 U.S. 420, 440, 442; *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 708-709. '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions. . . .'"
>
> *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-163 (concurring opinion).

> "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstanmes must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. * * *"
>
> *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895.

It is important, first, to briefly examine the nature of unemployment compensation, and to delineate the manner in which it differs from alternative measures for the unemployed, such as public assistance. This is a critical distinction since it is clear that the overriding consideration in *Goldberg* was that the lack of a pre-termination hearing before benefits were halted left the recipients destitute. The cruel circumstances in

which a welfare recipient may find himself when payments are terminated dictated the conclusion that the procedure was defective. These considerations are not pertinent under the unemployment insurance structure, however, as the following summary of distinguishing characteristics between unemployment insurance and welfare points out:

"The first and most generally found distinguishing criterion is that unemployment compensation makes cash payments to unemployed workers as a right under more or less clearly defined conditions which do not include, however, the requirement that the recipient undergo a test of need.

"Second, the amount of the payment is defined in the law in such a way that the worker can determine his benefit beforehand, and its amount is not subject to modification by the exercise of official discretion. The actual amount is a compromise between two often conflicting sets of consideration: the desire not to make a payment that is too close to the sum the worker would normally be expected to secure from employment and the conviction that the benefit should bear some relation to the need of the worker. This system of pre-determined and non-discretionary benefits is in sharp constrast to public assistance, where payments are theoretically based on the budgetary deficiency principle and depend upon the difference between each individual's (or more commonly, family's) estimated budgetary needs and his (or the family's) available resources. The determination of both needs and resources involves considerable discretion on the part of the official ad-

ministrators and always calls for an investigation of the family.

"A third distinguishing characteristic of unemployment insurance as compared with other measures for dealing with income loss due to unemployment is that payments are always limited to persons who are involuntarily unemployed and who have had some attachment to the labor market in some defined period prior to claiming benefit. This period may however, be so short as to be almost insignificant.

"In the fourth place, in unemployment compensation the period for which benefits are payable is defined is the law and is usually, but not always, limited to a perod of less than 52 weeks within a period of a year.

"In the fifth place, some part of the costs of unemployment compensation are normally provided by earmarked taxes paid into a special fund, apart from the general budget. Almost universally, these taxes include payroll taxes paid by employers; usually, except in the typical American law, they include also wage taxes paid by workers, and often, again with the notable exception of the United States, part of the costs are met by a contribution from the general revenues."

E. M. Burns, Unemployment Compensation and Socio-Economic Objectives, 55 Yale L. J. 1, 2-4 (1945).

The first characteristic noted above, that welfare payments are premised on need whereas need is irrelevant in determining eligibility for unemployment bene-

fits, was discounted by the court below. The court held that,

> "Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off than he, and this Court finds that the situation of the enemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client [sic] in *Kelly v. Wyman*, 294 F. Supp. 893 (1968), and the garnishee in *Sniadach v. Family Finance Corp. of Bay View, et al.*, 395 U.S. 337 (1969)."
>
> Appellants' Jurisdictional Statement, Appendix A at p. 6.

The District Court's sentiments are laudable but they are not relevant in this case. As compared to the person on welfare, the recipient of unemployment compensation benefits is much more likely to be able to get by for the short period of time required to resolve the issue of his eligibility because of the fact that immediately prior to that time he was earning money at a job. Under the unemployment insurance program, even the wealthy may receive benefits.[4] As one writer has pointed

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[4]Unemployment compensation benefits are based on wages paid during a base period (Section 1275 of the Code). An individual's weekly benefit amount is determined by the amount of wages paid him during the quarter of his base period in which his wages were highest (Section 1280 of the Code). Although an individual who earns less than $720 during his base period cannot establish a valid claim for benefits at all (Section 1281 of the Code), there is no corresponding maximum cutoff, *i.e.*, regardless of how much above $720 one earns, he may nevertheless file a claim. Moreover, if the individual has been

(This footnote is continued on the next page)

out, the committee reports and congressional debates on the Social Security Act of 1935 make clear that the absence of a "means" test as a condition precedent to eligibility,

> "[W]as considered the single most characteristic feature distinguishing unemployment compensation from relief. The requirement that payments be made only 'with respect to unemployment,' if read in light of the principle of social insurance, does prohibit a 'means' test: a payment predicated upon the satisfaction of the 'means' test is made not with respect to 'unemployment,' but with respect to 'needy unemployment.' 'Unemployment' *plus* need, or *plus* the possession of some desirable moral quality or the performance of some laudable act, is an impermissible basis for payments. The congressional purpose to eliminate the 'means' test reinforces what is a natural reading of the federal standard to include the social insurance principal." (Emphasis by the Author.)
>
> Note, Charity Versus Social Insurance in Unemployment Compensation Laws, 73 Yale L.J. 357, 377 (1963)

See:

S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935);

H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935);

79 Cong. Rec. 5468 (1935).

The Report to the President of the Committee on Economic Security (1935) emphasizes the differences

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steadily employed he could receive the maximum benefits allowable. Obviously, then, the more prosperous and steadily employed one is, the more likely he is to receive benefits, and possibly the maximum amount of benefits as well.

between unemployment benefits and welfare. The Committee noted that unemployment benefits could be paid only for periods of time which, to many people, would seem short, and that:

"The benefits are small, although considerably higher on the average than relief grants. While unemployment compensation is far from being a complete protection, *it is a valuable first line of defense for the largest group in our population, the industrial workers ordinarily steadily employed.* Unemployment compensation should permit such a worker, who becomes unemployed, to draw a cash benefit for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test. Normally the insured worker will return to his old job or find other work before his right to benefits is exhausted. If he does not find work, we recommend that his further period of unemployment should be met by a work benefit, as described in the section of this report dealing with employment assurance. This correlation between the cash benefit and the work benefit is recommended, and it seems to us that the combination is both fair and desirable. It will carry workers over most, if not all, periods of unemployment in normal times, without resort to any other form of assistance. While the maximum benefit periods indicated by the actuarial calculations are short in relation to the unemployment suffered by the people now on relief, it must be remembered that in ordinary industrial periods the great majority of workers who become unemployed find other work in a much shorter time." (Emphasis added.)

Report to the President of the Committee on Economic Security (1935) pp. 13-14.

The Report clearly shows that the likelihood that an unemployed person might have to turn to another form of economic assistance was contemplated by the Committee and accepted as an economic reality. By recommending to the President that a national unemployment insurance program be established, the Committee was not recommending simply another form of welfare. Carried to its logical extreme, however, the lower court's reasoning in the instant case would convert the California unemployment insurance program into welfare. If in enacting the Social Security Act Congress chose not to create dual welfare programs, that result should not be permitted by judicial decision.

Need was the critical factor in the determination of the procedural due process question in both the District Court and Supreme Court decisions in *Goldberg*. The District Court agreed with the state that the New York post-termination hearing procedure was constitutionally sufficient, but went on to hold that:

> "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. * * *"
>
> *Kelly v. Wyman* (S.D.N.Y. 1968), 294 F. Supp. 893, 899.

The court recounted in detail the plight of the terminated recipients and concluded that:

> "Suffice it to say that to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. * * *
>
> * * * *

"Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, . . ."

Kelly v. Wyman, 294 F. Supp. 893, 900-901.

This Court's opinion affirming the District Court's decision in *Kelly* equally emphasizes that the element of need present in the welfare context necessitated a holding that pre-termination procedures were required:

"[W]e agree with the District Court that when welfare is discontinued, only a pretermination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corporation, 395 U.S. 337, 23 L.Ed.2d 349, 89 SCt 1820 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239, 19 L Ed 2d 438, 442, 88 S Ct 362 (1967). Thus the crucial factor in this context —a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental largesse is ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (Emphasis by the Court.)

Goldberg v. Kelly, 25 L. Ed. 2d 287, 297.

Hardship to the welfare recipient whose payments are terminated has consistently been the underlying consideration supporting arguments favoring pre-termination hearings. *See,* Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich.L.Rev. 112 (1969); Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967).

Were the element of need extracted from the *Goldberg* situation, it is clear that post-termination procedures would have satisfied procedural due process. In the instant case, where the element of need is not a pertinent consideration, the California procedure similarly should be held to satisfy procedural due process. The District Court's holding that the appellees' position "is every bit as lamentable from the legal standpoint as that of the welfare client" misconstrues the purposes and structure of the unemployment insurance program.

The Employers do not maintain that procedural due process is inapplicable to the termination of unemployment benefits. The Court has expressly held that such benefits are protectible rights, *Sherbert v. Verner* (1963), 374 U.S. 398, and that the termination of those rights touches on significant constitutional questions. The Employers do contend, however, that the present hearing procedures are fully adequate to guarantee procedural due process.[5]

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[5]Section 303(a)(3) of the Social Security Act of 1935, 42 U.S.C. Section 503(a)(3), provides that:

"The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such

II.

The Interest of the Employer Should Be Balanced Against the Interest of the Unemployment Insurance Claimant.

Assuming *arguendo* that a hearing prior to withholding payments may be desirable, the Employers assert that their interest presents significant considerations outweighing the need for such a hearing.

In *Kelly v. Wyman* (S.D.N.Y. 1968), 294 F. Supp. 893, the District Court noted that welfare programs in the United States fall into two groups: general assistance, financed only by state and local governments, and categorical assistance, financed by the federal government. This Court held in *Goldberg* that the state's interest in conserving these public funds did not constitute an interest substantial enough in the welfare context to override the recipient's interest in uninterrupted receipt of public assistance. The Court agreed with the

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State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

"* * *

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied. . . ." (42 U.S.C. §503(a)(3)).

The section is comparable to a provision in the Aid to Families with Dependent Children portion of the Act, 42 U.S.C. Section 601 *et seq.*, which was under consideration in *Goldberg*. That section provides that:

"(a) A State plan for aid and services to needy families with children must . . . (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness. . . ." (42 U.S.C. § 602(a)(4)).

If the New York Statute designed to satisfy the latter section would have satisfied procedural due process in the absence of evidence of "brutal need." *Goldberg, supra,* the former section, which does not relate to need, should be constitutionally sufficient.

District Court that "the stakes are simply too high for the welfare recipient" to permit the governmental interest to outweigh the recipient's interest.

In sharp contrast to *Goldberg*, in the instant case the public purse in not involved. As the discussion in the section describing the interest of the *amici curiae* points out, the only individuals or entities affected by increased disbursements from the Unemployment Fund are employers within the state. And it was shown that the effect a decision upholding the District Court will have on the employers' interest could be substantial.

Although the facts before the court below concerned cases in which an employer appeals in initial determination of eligibility, the ramifications of the decision that the instant case is indistinguishable from *Goldberg* could be much more far-reaching. Since there are many instances in which unemployment benefits are currently withheld without a prior hearing, a decision that hearings of this sort are required in each case could have a disastrous financial effect on employers, as well as signal the end of the present unemployment insurance structure. The following categories exemplify instances in which payments are withheld prior to a hearing before a referee of the Unemployment Insurance Appeals Board.

> (a) A claimant not in claim status who is determined to be monetarily eligible for benefits and is not disqualified for reasons relating to his separation from his last employment may be disqualified without a hearing for being unavailable for work, for refusing suitable work, or for failing to seek work in the first week of a benefit series (Code, Sections 1253, 1257(b)).

(b) A claimant who is held initially eligible on a separation issue may be disqualified when the employer's appeal raises new facts which causes the department to redetermine the issue (Code, Section 1253.1(d)). In this situation the claimant receives one payment of benefits pursuant to the determination of eligibility. The department's statutory authority to redetermine the issue within 15 days in effect nullifies the determination of eligibility and holds the claimant disqualified from the beginning. Thereafter the claimant may appeal, but he is not paid benefits pending such appeal. The constitutionality of withholding benefits in this situation was challenged in the case of *Maria Covaciu v. Gilbert Sheffield* (Los Angeles County Superior Court 983-309). On October 22, 1970, the court denied the plaintiff's petition for writ of mandate, thus upholding the department's practice in this situation. However, a similar issue is under consideration by the United States District Court for the Southern District of New York in the case of *Torres v. New York Department of Labor et al.*, 70 CIV 2408. In that case, the plaintiffs were initially determined eligible and were paid, but were disqualified retroactively for voluntarily leaving their last employment and for willfully making false statements. On September 14, 1970 the U.S. District Court convened a three-judge court to consider the constitutionality of the retroactive disqualification without a prior hearing.

(c) A claimant who is initially disqualified by the department on a separation issue may appeal to a referee, who may in turn reverse the deter-

mination and hold the claimant eligible for benefits. However, the department withholds the payment of benefits if the employer appeals further to the full Unemployment Insurance Appeals Board (Code, Sections 1334, 1335). This factual situation brings into focus the position of the department in the instant case that the decision of eligibility, whether by a department interviewer or a referee, is not binding or enforceable so long as it is subject to further appeal.

(d) A claimant may be held eligible on a separation issue and draw benefits for a period of time. If thereafter a question of his eligibility for benefits with respect to a particular week arises, the claimant will be referred to a determinations interviewer for a resolution of the issue (See Code, Section 1253). California withholds benefits to the claimant until such issue is resolved in the claimant's favor.

(e) A claimant currently in claim status may be disqualified for a particular week for being in receipt of wages, for being unavailable for work, for refusing suitable work, or for failing to seek work (Code, Sections 1252, 1253, 1257). Under California law and procedure such a disqualification is effective immediately and benefits are withheld pending the claimant's appeal to a referee. A Federal District Court for the Northern District of California in *Crow v. Schultz* (C-70 1128 SAW) granted the plaintiff's motion for summary judgment on October 12, 1970 holding that *Goldberg* applies to unemployment insurance so as to give a claimant the right to an evidentiary hearing when an individual "is deprived of a statutory

pension which he has previously enjoyed due to an adverse finding where factual issues are in dispute, and where the agency concerned has acted upon third party information. . . ." The decision has been stayed until January 23, 1971.

(f) A claimant in claim status who is found eligible for benefits for a particular week may have benefits withheld either because the department determines that the claimant is liable to repay a prior overpayment or for investigation of a possible overpayment (Code, Section 1375 et seq.). California law provides that the department may offset benefits currently due in order to satisfy a previously established overpayment (Code, Section 1379(b)). While the overpayment is being considered, the department withholds the payment of benefits to protect its right to offset.

(g) A claimant in claim status who is held eligible for benefits for a particular week may have benefits withheld because the department has filed a criminal complaint against the claimant as the result of an alleged act of fraud committed in the past. Section 1263(c) of the Code specifically provides that the department shall suspend the payment of benefits to an individual effective upon the date of the filing of a criminal complaint against him. The Code further specifies that an individual convicted of making a false statement to obtain benefits is disqualified for 52 weeks commencing in the week in which the criminal complaint was filed.

If in each of the foregoing instances a pre-termination hearing were required, the drain on the Unem-

ployment Fund could increase significantly. At the other end of the spectrum, of course, is the possibility of establishing pre-eligibility hearings. But although this type hearing would certainly comport with procedural due process and conserve the Fund, the great majority of unemployment insurance claimants would suffer.[6] Between these two conflicting possibilities is the present structure, which adequately safeguards both the majority of claimants and the employers' financial interest. A decision tipping the scale toward unnecessary pre-termination hearings could increase the employers' unemployment contributions by a significant amount, yet fail to substantially better the position of the vast majority of claimants.

III.

Section 1335 Conforms to the Requirement That the State Program Be Reasonably Calculated to Insure Full Payments of Benefits When Due.

The court below compared the California procedure for determining eligibility and commencing payments to unemployment insurance claimants against the direc-

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[6]This would be an impossibility in any case, since in calendar year 1968, there were 960,180 claims for unemployment benefits filed. See Affidavit of George Roche, Appellee's Brief in Opposition to Motion to Intervene, Exhibit B.

Moreover, eligibility is determined on a weekly basis (Section 1253 of the Code). In 1969, of 404,930 determinations made disqualifying claimants from receiving benefits, 152,261 determinations were made disqualifying claimants in "claim status", *i.e.*, in the process of filing a weekly claim for benefits. Affidavit of Nicolo Pinto, Appellants' Jurisdiction Statement, Appendix C. If a hearing were required before halting payments to these claimants, the Department would have had to hold approximately 418 hearings every day of the year, including Saturdays, Sundays, and holidays. See also the Brief of the State of New York on *Amicus Curiae* in Support of the Jurisdictional Statement where it is noted on page 5 that in New York in 1969, some 7,880,000 weeks of benefits were paid.

tive of 42 U.S.C. Section 503(c)(1) that the program "be reasonably calculated to insure full payment of unemployment compensation when due. . . ." The court concluded that the initial determination by the eligibility interviewer marked the critical point in the California procedure, and that payments become "due" within the meaning of Section 503(a)(1) upon an affirmative determination by the interviewer.

The Employers have shown that even if payments are in fact "due" at this point, the subsequent termination of those payments without a prior hearing is not violative of procedural due process. See Part I, *supra.* The state and the Employers do not in any sense agree, however, that payments are "due" after the initial determination. The state and the Employers assert that payments are not due, *i.e.,* the obligation to pay benefits is not fixed, until an employer's appeal has been determined. As a matter of semantics alone, benefits cannot be "due" at a particular time when there is a substantial question of whether it is a fixed obligation.

In its decision granting the appellees' Motion for Preliminary Injunction, the District Court explored the Department's practice for determining a claimant's eligibility for benefits. That practice, contained in a stipulation submitted by the parties, reflects several stages at which the claimant and his previous employer may submit information bearing on the claimant's eligibility. After progressing through these stages, the interviewer makes an eligibility determination. The District Court rejected the appellants' argument that that determination was merely preliminary, holding that the argument "flies in the face of" actual Department practice. But the court's conclusion ignores the distinction between what is actually ***required*** and what may be current

Department practice. The Employers submit that until they have had a full opportunity to refute a former employee's claim, there is no obligation on the Department to commence payments at all. This is implicit in the language of Section 1335. See note 1, *supra*. From a practical standpoint, however, it is not unreasonable for the Department to begin payments immediately, since in 98% of the cases no employer appeal is filed. The Department's practice reflects simple administrative expediency. A decision by this Court that payments are "due" upon the initial determination of eligibility could lead to a revision in the current practice such that a more formal determination would not be made, and benefits not paid, until the employer's ten-day period in which to appeal has expired.[7] This would, of course, deny one or two benefit payments to 98% of all claimants, whereas under the current practice, only 2% of all claimants have payments withheld after *receiving* one or two payments. The present practice is generous to the vast majority of unemployment insurance claimants, fair to the employer, and administratively sound. To follow the appellees' argument that benefits be payable immediately and before an employee's appeal is heard would upset the balance currently struck be-

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[7]It would also be a simple matter to extend the waiting period for the commencement of payments from the current one-week period to a longer period. See Section 1253(d) of the Code. The states are granted freedom under the Social Security Act of 1935 to determine their own waiting periods. *See* Report to the President on Economic Security (1935), *infra*. The fact that the state could have all claimants wait for any payment until the employer appeal period expired and thereby avoid having what could be termed a "termination" of benefits indicates the insubstantiality of the appellees' argument that they are entitled to a "pre-termination" hearing. Procedural due process in this case surely cannot depend on whether California continues its present practice or makes everyone wait a ten-day period before commencing payments.

tween the claimants' and the employers' interests, and could result in either administrative chaos or the loss of some payments of benefits to the other 98% of all claimants.

The Employers contend that a full opportunity for their arguments against a claim to be heard is necessarily within the mainstream of the determination process. Until that time, the interviewer has seen only the claimant personally; the claimant has in all probability established a rapport with the interviewer which the employer does not have. An employer appeal, where the employer's arguments may be fully heard, is necessary in order that the conflicting positions of the claimant and the employer may be resolved in an atmosphere in which the parties are on a more equal footing. To hold that payments are "due" before the employer has had a full opportunity to be heard would deny employers of their unemployment insurance contributions without due process of law.

Even if it were assumed that payments are generally "due" upon the initial determination, Section 1335 nevertheless comports with the requirement of Section 503(a)-(1). This is shown by the following discussion of the crux of the "when due" requirement—a point largely bypassed by the District Court. That point is whether the *program* is *reasonably calculated* to assure full payment when due.[8] It is clear that the California

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[8]That the District Court based its conclusion on an improperly narrow ground, rather than on the "reasonably calculated" principle of Section 503(a)(1) is illustrated by the following quote, where the court ignored the phrase "reasonably calculated" altogether:

"This was certainly the primary reason for 42 U.S.C. § 503 (a)(1) and the requirement that state programs assure full payments 'when due. . . .' [I]t is clear that as to these people,

(This footnote is continued on the next page)

program is designed to comport with that requirement, and that it does so with commendable effectiveness. The provision in Section 1335 which suspends payments pending an employer appeal does, of course, leave open the possibility that some eligible claimants will have benefits withheld for a short period. But the number of claimants whose benefits are deferred is so small that it must be concluded that the program is reasonably calculated to assure payments when due. This is borne out by the fact that of 401,917 issues of eligibility determined favorably to the claimant in 1968, in only 5,526 cases were employer appeals filed. Of those appeals, the determination of eligibility was upheld in 2,924 cases. These figures show that in effect approximately 1% of eligible claimants ever have benefits withheld under Section 1335, as well as illustrate that employer appeals are taken in good faith.[9] Although the legislative history of the Social Security Act does not reveal the authors' meaning of "reasonably calculated", it is apparent that they did not contemplate providing immediate payment to all. The Report to the President of the Commitee on Economic Security (1935), illustrates that federal controls designed to restrict the states to an unnecessary degree were specifically disapproved. The Committee stated that:

> "[T]he Congress can at any time increase the requirements which State laws must fulfill and

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payments are not made 'when due', and the fundamental intent and policy of the Social Security Act are thwarted." (Appellants' Jurisdictional Statement, Appendix A at p. 7).

[9]See Exhibits B—G appended to the Motion of Southern California Edison, *et al.* to Intervene as Defendants.

may, if it sees fit, at some future time, substitute a federally administered system for the cooperative Federal-State system we recommend.

"All things considered, however, we deem it the safest and soundest policy to confine the role of the Federal Government with respect to this problem at this time to removing obstacles to State action, safeguarding and liquidating the reserve funds, and aiding the States with their problems, leaving to them primary responsibility for administration.

* * * *

"The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States. * * *

"The States should have freedom in determining their own waiting periods, benefit rates, maximum benefit periods, etc. * * *"

Rptr. of the Comm. on Econ. Sec. at pp. 16, 20.

These statements indicate that so long as the general tenor and purposes of the Act are followed, the states may administer their programs with relatively unfettered discretion. If, as part of a state program, it is provided that under certain circumstances payments of benefits may be deferred, such a provision should not be considered a *per se* failure to comport with Section 503-(a)(1). The entire program should be examined,

rather than the isolated provision, to determine whether it is reasonably calculated to assure payment when due. In this case, it is clear that the program is effective and meets those requirements. Thus, even assuming that "when due" refers to an initial determination of eligibility, Section 1335 and the California program as a whole meets the "reasonably calculated" test. The fact that the Secretary of Labor has certified the program negates any argument to the contrary. *Cf. Rosado v. Wyman*, 397 U.S. 397 (1970).[10]

Conclusion.

The Employers submit that the District Court entered the injunction in this case on the basis of incomplete facts, and without considering the interest of

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[10]Other states have programs similar to California's; they have been accepted by the Secretary for many years, and have never been questioned. A provision similar to the present California Code Section 1335 appeared as early as 1937. An amendment to the Unemployment Reserves Act, Stats. 1937, Ch. 742, Sec. 67 provided that:

> "Sec. 67 . . . Unless the claimant, such employer, or such other interested persons within 5 calendar days after delivery of such notification, or within 7 calendar days after such notification was mailed to his last known address on file with the Commission, files with the Commission an appeal from the decision of the deputy or referee, such decision of the deputy or referee shall be final and benefits shall be paid or denied in accordance therewith; provided that if a referee affirms a decision of a deputy, or the Commission confirms the decision of a referee allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed no employer's account shall be charged with the benefits so paid as to which the decision was reversed."

The foregoing quotation from the predecessor of Section 1335 also serves to more clearly show that the interviewer's determination was not intended to be final, *i.e.*, payments were not "due", until either the time for filing an appeal had expired, or until the appeal was decided favorably to the claimant.

the Employers and the Secretary of Labor. The Employers therefore urge that the decision of the District Court be reversed or remanded in order that these interests may be adequately presented.

Dated: Dec. 8, 1970.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, ET AL., APPELLANTS

v.

JUDITH JAVA AND CARROLL H. HUDSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court is reported at 317 F. Supp. 875.

JURISDICTION

The judgment of the three-judge district court declaring Section 1335 of the California Unemployment Insurance Code unconstitutional and enjoining its enforcement was entered on May 14, 1970 (App. 133). Notice of appeal was filed on June 12, 1970. Probable jurisdiction was noted on October 26, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether a state procedure that requires the withholding of unemployment compensation benefits pending an initial administrative appeal is a method of administration "reasonably calculated to insure full payment of unemployment compensation when due" within the meaning of 42 U.S.C. 503(a)(1).

2. Whether a State's withholding of unemployment compensation benefits pending an administrative appeal is constitutionally permissible.

STATUTES INVOLVED

Section 1335 of the California Unemployment Insurance Code provides:

> If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:
>
> (a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or
>
> (b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.
>
> If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination.

Section 303(a)(1) of the Social Security Act, 42 U.S.C. 503(a)(1), provides in part:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for:
>
> (1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; * * *

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the administration of the California Unemployment Insurance Program under review on this appeal. All costs necessary for the prompt and efficient administration of the California program, and of all federal-state cooperative unemployment insurance programs, are paid by grants from the United States pursuant to the Social Security Act, 42 U.S.C. 501–503. No grant may be made to a State for a fiscal year unless the Secretary of Labor certifies the amount to be paid. 42 U.S.C. 502(a). Under Section 303, 42 U.S.C. 503, the Secretary of Labor may not certify any payments unless he first finds that the State's program conforms to the federal requirements set forth in that Section.

The issues raised on this appeal concern one of those requirements, specifically the required state method of administration under Section 303(a)(1), and necessarily draw into question the Secretary's continued statutory authority to certify the program in California and other States having similar methods of administration.

STATEMENT

Following their separation from employment in California, appellees Java and Hudson filed claims for unemployment compensation with the California Department of Human Resources Development (App. 8–9).[1] In both instances, the Department initially determined that they were eligible to receive unemployment compensation and immediately commenced payments to them (App. 8–9). In each case, upon the former employer's filing of an administrative appeal,[2]

[1] Upon filing a claim, the claimant supplies the interviewer with information concerning his work experience, his former employment and his reason for no longer working (App. 135). His former employer is notified of the claim and is asked to furnish information that might affect the claimant's eligibility. Cal. Unemp. Ins. Code § 1327. The claimant then appears for an interview (App. 130–131). If a question of eligibility has arisen, because of either the employer's protest or other facts, the interviewer must make a determination of eligibility (App. 120–121). If necessary, the interviewer will seek more information relating to the claim before making a determination (App. 121–123). If the claimant is determined eligible, payments begin immediately (App. 131–132).

[2] Under Section 1328 of the California Unemployment Insurance Code, an employer may "appeal" a claims interviewer's eligibility determination by requesting a hearing before a referee, if such request is made within 10 days. "A referee after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, or modify any

the Department, as required by Section 1335 of the California Unemployment Insurance Code, halted further payment of benefits pending hearing and decision of the appeal.[3]

The employees commenced a class action in the district court on behalf of themselves and other claimants similarly situated, seeking a declaration that Section 1335 of the California Unemployment Insurance Code is unconstitutional, and inconsistent with Section 303(a)(1) of the Social Security Act, *supra*, and seeking an order restraining the operation of Section 1335.

The three-judge court concluded that the challenged statute did not comply with Section 303(a)(1) of the Social Security Act, which requires each State, as a prerequisite to federal financial assistance, to administer its unemployment compensation program in a manner "reasonably calculated to insure full payment of unemployment compensation when due." The court held that benefits are "due" to a claimant in California when a favorable administrative determination

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determination which is appealed." Cal. Unemp. Ins. Code § 1334. The referee's decision becomes "final, unless within 10 days after mailing of such decision, further appeal is initiated to the Appeals Board." *Id.* § 1334. The Appeals Board, which must render its decision within 60 days after the filing of an appeal to it, *id.* § 1337, "may on its own motion affirm, modify, or set aside any decision of a referee on the basis of evidence previously submitted in the case, or may direct the taking of additional evidence." *Id.* § 1336.

[3] If upon appeal the referee finds the claimant eligible, payments begin at once even if the employer appeals further. Cal. Unemp. Ins. Code § 1335(b). See *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280, 109 P. 2d 942.

is made by the eligibility interviewer and, accordingly, the federal statute requires that such benefits thereafter be promptly paid (App. 137, 139). In the court's view, application of Section 1335 constituted a failure to pay unemployment compensation "when due" because an average appeal took six to seven weeks (App. 139).

Relying on *Goldberg* v. *Kelly*, 397 U.S. 254, the court also held that the California procedure denying benefits pending decision of an employer's appeal constituted a denial of procedural due process (App. 138–139).

SUMMARY OF ARGUMENT

I

Section 1335 of the California Unemployment Insurance Code complies with Section 303(a)(1) of the Social Security Act, which requires state methods of administration of unemployment compensation plans to be "reasonably calculated" to insure payment of benefits "when due." The Committee on Economic Security, which had proposed the Social Security Act, distributed to Congress and the States two "model laws," both of which contained procedures similar to California's Section 1335. Moreover, Congress indicated approval of such a procedure by making it applicable to the District of Columbia. It cannot reasonably be supposed that the Committee's proposals and Congress' legislation with respect to the District of Columbia, which set an example for the States to follow, contemporaneously violated the Act.

The fact that California has modified the procedure contemplated in the "model laws" by starting payments immediately after the interviewer's determination rather than only after the employer's time to appeal has expired does not transform an otherwise valid procedure into an invalid one. Congress surely could not have intended to preclude States now following the "model laws" approach from adopting California's practice, which is more favorable to the vast majority of claimants because it allows payments to begin earlier.

Nor is the average six-to-seven week period required for California's hearing and decision of the employer's appeal inconsistent with federal requirements. The Secretary of Labor, in certifying California's program, has not considered this delay unreasonable, although he is concerned about the general problem of delay and is presently considering promulgating federal standards with respect to this subject.

II

California's Section 1335 does not deny claimants due process. This case is unlike *Goldberg* v. *Kelly*, 397 U.S. 254, because the procedures involved here concern the entitlement stage rather than the termination stage as in *Kelly*. The Constitution does not require payments to begin merely upon the filing of an application and, consequently, California could have chosen any of several other constitutionally permissible ways

of administering its program, such as having the interviewer defer decision on contested claims until after hearing. Many of these alternative procedures would adversely affect the 95 percent of claimants who never go beyond the interviewer stage under the present California practice.

We believe the district court erred in viewing the withholding of payments upon the employer's appeal as, in effect, equivalent to suspending benefits which had previously been granted. The interviewer's determination is only a provisional one which serves the purpose of quickly filtering out uncontested claims. That California begins paying benefits immediately after the interviewer's determination shows only that it has wisely decided not to disadvantage 95 percent of its claimants, who never go beyond this stage, simply because in 5 percent of the cases eligibility must be decided after an employer-requested hearing. Since it is permissible for a State not to start payments until the employer's time to appeal has expired, there is no reason for condemning California's more efficacious approach.

In light of the available alternative methods of administering an unemployment compensation program, the reasons underlying California's choice among them, and other relevant considerations, California has not denied claimants due process by following the procedures prescribed by Section 1335.

ARGUMENT

I. SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE COMPLIES WITH SECTION 303(a)(1) OF THE SOCIAL SECURITY ACT

Under the general scheme[4] of unemployment insurance, compensation is paid to eligible individuals pursuant to state unemployment compensation laws, which are administered by state agencies.

Actual payments to unemployed workers come from state funds raised by contributions levied on employers. However, necessary costs for proper and efficient administration of the State's program are paid by the federal government if, pursuant to Section 303 (a) of the Social Security Act, *supra,* the Secretary of Labor finds that the State's laws conform to federal requirements.

One such requirement is the provision in Section 303(a)(1) of the Social Security Act, *supra,* that

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State * * * includes provision for—
>
> (1) Such methods of administration * * * as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due * * *.

[4] The federal program initially was established by Titles III and IX of the Social Security Act of 1935, 49 Stat. 620, 626, 639. These titles, as most recently amended by the Employment Security Amendments of 1970, P.L. 91-373, 84 Stat. 695, now constitute 42 U.S.C. 501-504 and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301-3311.

From the beginning, the Secretary of Labor has found procedures, such as those followed in California, to be consistent with Section 303(a)(1). Indeed, withholding payment until after hearing and decision of the initial administrative appeal is the procedure currently followed by the great majority of States with federally-approved programs. We believe that in certifying these programs for federal grants, the Secretary correctly construed Section 303(a)(1).

When the Social Security Act of 1935 was being considered by Congress, the President's Committee on Economic Security, which had prepared the initial drafts of the Act, circulated to the States and submitted to Congress two "model laws" prepared by the Committee to help the States formulate unemployment compensation laws meeting federal requirements. The Committee presumably recognized that for the vast majority of cases, eligibility for compensation would be clear and hearings would be unnecessary. Accordingly, prompt and efficient administration could be accomplished by having all claims initially screened by low-level administrators without the delay and formality of hearings. However, the Committee also apparently recognized that in some cases, undoubtedly a small minority, eligibility determinations would give rise to difficult questions of fact or law. One solution would have been to have the interviewer defer decision in such cases and automatically set them down for hearing before a referee. However, the Committee proposed a different approach, apparently based on the belief that employers would gen-

erally accept adverse determinations by claims interviewers without seeking a hearing and that, in the main, the claims for which employers would request hearings would be those involving substantial questions.[5] Thus, in Section 8 of both state model laws the Committee recommended that when a hearing is requested, benefit payments not be made pending the outcome of the referee's decision.[6]

> (2) *Initial determination.*—A deputy designated by the commission shall promptly determine whether or not the claim is valid, and the amount of benefits *apparently* payable thereunder, and shall duly notify the employee and his most recent employer of such decision. Benefits shall be paid or denied accordingly, unless either party requests a hearing within 5 calendar days after such notification was delivered to him or was mailed to his last known address [emphasis added].
>
> (3) *Appeals.*—Unless such request for a hearing is withdrawn, the claim thus disputed shall be promptly decided after affording both parties reasonable opportunity to be heard * * *.

In apparent agreement with the Committee's suggestion, the same session of Congress that enacted the Social Security Act of 1935 also enacted an unemployment compensation law for the District of Columbia, 49 Stat. 946, Section 12 of which provided that if

[5] The experience in California bears this out: in 95 percent of the cases employers do not seek a hearing (App. 137), and nearly 50 percent of the claims where employers seek hearings are reversed (App. 104).

[6] *Hearing on S. 1330 Before the Senate Committee on Finance*, 74th Cong., 1st Sess. 591, 602, 623.

an appeal is filed "no benefits shall be paid" to the claimant until the appeal is decided.

The Social Security Act of 1935 was approved on August 14, 1935, and approval of the District of Columbia Unemployment Compensation Act followed just 14 days later on August 28. In this situation, it would be unreasonable to suppose that Congress contemporaneously violated its own mandate when it implemented the Social Security Act in the District of Columbia and thereby set an example for all the States to follow.[7] And it is similarly inconceivable that the Committee on Economic Security would offer to the States a suggested method of administration out of conformity with the very legislation it had proposed to Congress, and which became the Social Security Act of 1935. In short, Congress' adoption of the equivalent to the model laws' Section 8 manifests the understanding that this provision conformed to the federal standard in Section 303(a)(1), requiring that the State's method of administration be "reasonably calculated to insure the full payment of unemployment compensation when due."

In Section 1335 of its Unemployment Insurance Code, California has thus followed not only the recommendation of the Committee on Economic Security but also the implicit, if not explicit, suggestion of Congress through its legislation with respect to the District of

[7] Only Wisconsin had adopted an unemployment compensation law before it became apparent that the federal bill would be passed. See *Steward Machine Co. v. Davis*, 301 U.S. 548, 587–588.

Columbia. That only a small percentage of California claimants experience delay in receiving benefits illustrates the wisdom and success of this procedure. But more important, it also shows that California has adopted a method that is "reasonably calculated" to pay compensation when due, as Section 303(a)(1) of the Social Security Act requires.

In one respect, California has gone beyond the model laws: it has decided to pay benefits immediately upon the interviewer's eligibility determination rather than after the employer's ten-day period for requesting a hearing expires. Of course, in all but a small percentage of cases there is little reason for waiting; the interviewer's determination will be the end of the matter. The fact that for this reason California begins payments immediately surely does not transform an otherwise valid method of administration into an invalid one. It would be pure formalism to characterize, on the basis of this practice, compensation payments as "due" after the interviewer's determination and then use this characterization to show that in cases where employers request hearings, "due" payments are delayed in violation of Section 303(a)(1). For this rationale would result in the anamolous circumstance that state procedures allowing payments to begin only after the employer's time to appeal has run would conform to Section 303(a)(1), while procedures such as California's would not. Thus, precluding California (and other States) from continuing its present practice would disadvantage the vast majority of

claimants who never go beyond the initial stage and prevent other States from adopting California's more favorable practice—a result Congress surely could not have intended.

Nor is the average six-to-seven week period required for California's hearing and decision of the appeal inconsistent with federal requirements. Congress must have realized that some delay would occur. Indeed, at the time Congress passed the Social Security Act, the number of unemployed averaged more than 10 million;[8] the sheer magnitude of the number of claims Congress knew would have to be handled in itself refutes any notion that the Act was intended to require immediate hearing and decision on each claim. Of course this not to say that unreasonable delays are, or should be, tolerated. The Secretary of Labor is cognizant of the need for increased promptness and, insofar as it is possible to shorten the delay without denying a fair hearing to the participants, he intends to effectuate improvements.[9] But, as the Secretary has concluded by certifying California's program, the time for decision on appeal in that State should not now be considered unreasonable.[10]

In our view, therefore, the district court should have held California's method of administration to be consistent with Section 303(a)(1).

---

[8] See *Steward Machine Co.* v. *Davis*, 301 U.S. at 586.

[9] The Secretary is presently considering the wisdom and feasibility of promulgating a specific federal standard of the time within which each State must complete its procedures for determining whether benefits are due.

[10] See Brief for the Appellant, at 15.

II. SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS CONSTITUTIONALLY VALID

In *Goldberg* v. *Kelly*, 397 U.S. 254, the issue was "whether the Due Process Clause requires that the [welfare] recipient be afforded an evidentiary hearing *before* the termination of benefits." 397 U.S. at 260 (emphasis in original). This Court answered in the affirmative. To the district court, the instant case was indistinguishable from *Kelly* and, consequently, it held that under Section 1335 of the Unemployment Insurance Code, California denied claimants due process by withholding benefit payments pending the outcome of employer-requested hearings.

Neither the district court's opinion in the present case, nor this Court's decision in *Kelly*,[11] would prohibit a State from withholding compensation benefits until eligibility is initially determined; surely nothing in the Constitution requires payments to begin merely upon the filing of an application.[12] Thus, whether the district court correctly analogized this case to *Kelly* hinges on the validity of its view that after an interviewer makes an eligibility determination, matters pass beyond the entitlement stage so that benefits thereafter granted cannot be "terminated" without a prior hearing. We believe that this view of California's procedure, which the district court based on the

[11] See *Wheeler* v. *Montgomery*, 397 U.S. 280, 284–285 (Chief Justice Burger, dissenting).

[12] Of course due process may require that an eligibility hearing be held. See *Greene* v. *McElroy*, 360 U.S. 474, 496. At what stage of the process this is required is another matter.

State's practice of beginning payments immediately after the interviewer's determination, is unwarranted and that California's method of administration does not violate the due process clause.

For welfare-termination cases, this Court's decision in *Kelly* gave the states two alternatives: (1) hold a pretermination hearing; or (2) continue payments until the statutory "fair hearing" is held, even though there has been a prior decision to terminate, 397 U.S. at 266–267 & n. 14. But *Kelly* dealt with termination of benefits. Procedures at the entitlement stage, which are at issue here, involve additional considerations. One way for California to comply with the district court's judgment would be to pay benefits until after hearing and decision.[13] This assumes, however, that California would find it feasible to retain its present method of evaluating applications in light of the district court's modification. Obviously that would not necessarily be the case. For there are several other ways of handling claims and the difficulty is that some of these not only may fail to prove as effective for the vast majority of claimants as the method California has been following, but also may not significantly improve matters with respect to claimants situated similarly to those in this case.

For example, California could simply abolish the screening function performed by the interviewer and automatically set each claim down for hearing (in the absence of waiver by the employer). Or it could refrain from paying benefits until after the employer's

[13] Rhode Island now follows such a practice. R.I. Gen. Laws § 28–44–40.

time to appeal expired, thus making clear that the interviewer's determination is only a provisional one intended to filter out uncontested claims expeditiously.[14] Along similar lines, the State could require the interviewer to defer decision and set the case down for hearing before a referee whenever the employer challenges a claim in writing.[15] Still another alternative would be to have the interviewer himself hold a hearing whenever a question of eligibility is raised.[16]

As previously indicated, none of the foregoing methods of determining eligibility would be precluded by *Kelly*, since none of these procedures would involve the withdrawal of benefits previously granted. Of course, we do not mean to suggest that each is a suitable plan, still less that all are equally desirable. That is a judgment Congress left to the individual States so long as certain standards are met. The size of its workforce, the distribution of its population, the nature of its industry, the rate of unemployment, the quantity and quality of available administrators—these and other factors bear on what is best for a particular State.

Hence, the issue here comes down to this: in light of the alternative methods of administering an unemployment compensation program, has California chosen one that violates due process? The answer, we submit, is "No."

As we mentioned at the outset, the district court

[14] See, *e.g.*, D.C. Code § 46–311(b); Ark. Stat. § 81–1107(e).

[15] Compare *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 107–108 (concurring opinion).

[16] North Carolina now follows a similar practice. See N.C. Gen. Stat. § 96–15(b)(2).

found this case analogous to a termination-of-benefits case solely because California begins payments immediately after the interviewer's provisional determination. Of course, if California, like many other States,[17] were to begin payments only after expiration of the time to appeal [redacted] and only after hearing and decision if the appeal is taken, there would be no basis for concluding that during the six-week period for decision on appeal, claimants were being deprived of benefits which had previously been granted. Under that procedure (suggested in the model acts, *supra,* p. 11) it would be clear that the interviewer's provisional determination performed only a screening function. However, California has chosen to begin payments immediately. And it has done so not because it views the interviewer's decision as anything more than provisional, but rather because it decided not to have all claimants wait ten days when, in more than 95 percent of the cases, the interviewer's determination would become final anyway. Of these two methods of administration, California's present procedure is certainly more efficacious for all categories of claimants. Accordingly, what we said with respect to the appellees' statutory claim is equally relevant here: it would make no sense—and, indeed, would be detrimental to claimants—to hold that California's procedure violates the Constitution

[17] See note 14, *supra.* In the United States' view, a State does not deny an *employer* due process by beginning payments immediately

when otherwise identical plans which provide instead for a preliminary ten-day waiting period clearly do not.

In sum, when one considers "the available alternatives to the procedure" California has followed, "the reasons for" California's following that procedure, "the balance of hurt complained of and good accomplished" for more than 95 percent of the claimants, and "the interest that has been adversely affected,"[18] which is not accurately framed in terms of the withholding of benefits already granted—in short, when the traditional ingredients of due process are considered, it is clear that California has not violated that constitutional requirement.

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after a referee's decision, even though the employer appeals from that decision and may eventually seek judicial review. See, *e.g.*, *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280, 109 P. 2d 942; *Aero Design & Engineering Co.* v. *Oklahoma Employment Security Commission*, 151 F. Supp. 844 (W.D. Okla.), affirmed *per curiam*, 353 U.S. 943; *Abraham* v. *Van Meter*, 303 P. 2d 434 (Okla.), appeal dismissed, 353 U.S. 944; *Todd Shipyards Corp.* v. *Texas Employment Commission*, 245 S.W. 2d 371 (Tex. Civ. App.); *State* ex rel. *Aikens* v. *Davis*, 131 W.Va. 40, 45 S.E. 2d 486. But see *State* ex rel. *Campbell* v. *State*, 223 Ind. 59, 57 N.E. 2d 433; *Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N.W. 303; *Chrysler Corp.* v. *Unemployment Compensation Commission*, 301 Mich. 351, 3 N.W. 2d 302; *Pennsylvania State Chamber of Commerce* v. *Torquato*, 386 Pa. 306, 125 A. 2d 755, certiorari denied, 352 U.S. 1024.

[18] The quotations are from Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 149, 163.

CONCLUSION

The judgment of the district court should therefore be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

JUDITH JAVA, *et al.*,

Appellees,

—v.—

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, *et al.*,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE EMPLOYMENT PROJECT, CENTER ON SOCIAL WELFARE POLICY AND LAW AS *AMICUS CURIAE*

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Interest of the *Amicus*

Unemployment compensation benefits are a most important source of income for poor persons who become unemployed. The denial of benefits in every instance in which an employer requests an appeal of a determination favorable to an unemployment compensation claimant creates a most difficult problem for such persons by denying them benefits to which they have been determined to be entitled.

The Employment Project of the Center on Social Welfare Policy and Law is funded by the Office of Economic Opportunity. It is charged with assisting Legal Services programs in litigation and other activities which will help make existing law more responsive to the employment needs of the poor. Consistent with this responsibility, the Project has devoted a substantial portion of its efforts to unemployment compensation reform. Primarily through litigation, the Project has concerned itself with procedural and substantive issues concerning the administration of unemployment compensation as it affects the poor.

The procedure followed by the State of California, which was held unconstitutional by the Court below, is also followed in unemployment compensation programs in most other states. It is a policy which results in substantial, repeated, and unnecessary hardships for individual working poor persons in all of these states. Obviously, the ruling in this case will have a substantial impact on their legal rights.

For these reasons, the Employment Project submits this Brief, *Amicus Curiae.*

Consent for the filing of this Brief, *Amicus Curiae,* has been obtained from the parties to this appeal.

Summary of Argument

Goldberg v. *Kelly,* 397 U.S. 254 (1970), held that the Due Process Clause of the United States Constitution requires that welfare benefits not be terminated without prior evidentiary hearings. Recent cases extending this rule to unemployment compensation have been correctly

decided because unemployment compensation, like welfare, is a government-administered benefit program intended by Congress to meet the very real needs of unemployed workers and because benefits are distributed only after an exhaustive investigation to determine eligibility. Further, 42 U.S.C. §503 requires that the method of administration of unemployment insurance programs be reasonably calculated to insure payment of benefits to recipients "when due." The delay in payment occasioned by summary terminations violates this requirement.

ARGUMENT

A.

The automatic suspension of plaintiffs' unemployment compensation benefits without a prior evidentiary hearing violates the due process clause of the Fourteenth Amendment to the United States Constitution.

1. *Goldberg* v. *Kelly* and Similar Cases Require Hearings Prior to Termination of Government Benefit Payments.

In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), affirming *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), this Court held that once a determination of eligibility for governmentally administered benefits has been made in favor of a recipient by the concerned state agency, those benefits may not be terminated without a prior evidentiary hearing if uninterrupted receipt of those benefits is of substantial importance to the recipient. Subsequent to *Goldberg*, this Court has indicated that it will consider the constitutional implications of benefit *reductions* without prior hearings, *Daniel* v. *Goliday*, 398 U.S. 471 (1970). Lower courts have

applied the *Goldberg* rule to a number of public benefit programs; see *Escalera* v. *New York City Housing Authority,* 425 F.2d 853 (2nd Cir. 1970) (due process hearing required prior to eviction from public housing or additional rental charges); *Cloud* v. *Dietz,* Civil No. 374 (E.D. Ky. April 22, 1970) (medical assistance); *Harrell* v. *Harder,* Civil No. 13,800 (Conn. April 30, 1970) (all recipients including medical assistance and food stamps); *Merriweather* v. *Burson,* Civil No. 13,630 (Ga., April 22, 1970) (reductions); *Doyle* v. *Finch,* Civil No. SA 69-321 (W.D. Tex. Aug. 10, 1970) (disability payments); *Barnett* v. *Lindsay,* Civil No. 328-69 (Utah, Apr. 2, 1970) (assistance terminations, reductions, delayed original applications); *Wright* v. *Finch,* CA No. 1457-70 (D.D.C. Jan. 6, 1971) (disability insurance); *contra, Messer* v. *Finch,* 314 F. Supp. 511 (E.D. Ky. 1970), *vacated as moot* —— U.S. —— No. 768 (Jan. 11, 1971) (no constitutional deprivation in disability benefit termination because payments continued two months after disability disallowed).

Most importantly, the Three-Judge Court below in *Java* v. *California Department of Human Resources Development,* 317 F. Supp. 875 (N.D. Cal. 1970), and a Single-Judge Court in *Crow* v. *California Department of Human Resources,* C-70 1128 ACW (N.D. Cal. Oct. 12, 1970), have applied *Goldberg* to unemployment compensation. One Federal Court, the Southern District of New York, has refused to follow these cases. *Torres* v. *New York State Department of Labor,* 70 Civ. 2408 (S.D.N.Y. January 7, 1971) (Judge Lasker concurring and dissenting).

Prior to *Goldberg* this Court applied constitutional protections to the administration of government benefits in many situations: *Sherbert* v. *Verner,* 374 U.S. 398 (1963), prohibited the infringement of religious freedom as a con-

dition of unemployment compensation and *Slochower* v. *Board of Higher Education,* 350 U.S. 551 (1956), established that due process protects public employment even though there is no constitutional right to such employment. This Court also applied due process protection to private litigation involving current income: *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337 (1969), held that a creditor could not deprive a wage earner of current income by use of garnishment without a prior hearing. Additionally, *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir.), *cert. den.* 368 U.S. 930 (1961), applied due process protection to enrollment in public schools. In fact, the cases in this area have assumed that prior due process hearings were the norm and that only in certain carefully limited circumstances could there be an exception to that norm. See *Goldberg* v. *Kelly,* 397 U.S. 254, 263 fn. 10 (1970); *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 896 (1961) (government's unfettered control of military installations justified the exception); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594 (1950) (protection of consumer from mislabeling justified the exception); *Bowles* v. *Willingham,* 321 U.S. 503 (1944) (immediate regulation of wartime rentals justified the exception); *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589 (1931) (government interest in unpaid corporate taxes justified the exception). The rationale of these cases makes it clear that *Goldberg, supra,* applied the traditional rule.

As was noted by the Three-Judge Court below, unemployment compensation is indistinguishable from the welfare programs before the Court in *Goldberg.* 317 F. Supp. 875, 878. Unemployment compensation is (1) a government

benefit program (operated in this case by the State of California) under which (2) current receipt of benefit payments is of extreme importance to recipients and (3) exhaustive initial determinations of eligibility for continuing benefit payments are made.

2. Unemployment Compensation Is a Government Benefit Program.

In upholding the validity of the federal unemployment compensation program, the Supreme Court made it clear that unemployment compensation is a government benefit program. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). See also *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

A review of the structure and administration of unemployment compensation raises no doubts concerning this conclusion. Unemployment compensation is paid from a fund created by federal (26 U.S.C. §§3301 *et seq.*) and state taxing powers (Cal. Unempl. Ins. Code, §§901-1176; N.Y. Lab. L. §§550-562). The state collects the tax (Cal. Unempl. Ins. Code §101; N.Y. Lab. L. §570); determines eligibility for benefits (Cal. Unempl. Ins. Code §§1251-1254; N.Y. Lab. L. §§590, 591); pays benefits (Cal. Unempl. Ins. Code §§1326, 1339; N.Y. Lab. L. §590); recovers overpayments (Cal. Unempl. Ins. Code §§1375, 1379; N.Y. Lab. L. §594); and prosecutes those who receive benefits fraudulently (Cal. Unempl. Ins. Code §2101; N.Y. Lab. L. §632).

The employers' concern with unemployment compensation, in contrast, is minimal. That interest is precisely the same as the interest of any taxpayer group composed of less than the entire public. An employer pays a tax rate which is partially determined by the amount paid from the

fund to his former employees but this experience rated tax is never increased because of an erroneous payment (such as might be made while an appeal is pending). Cal. Unempl. Ins. Code §§1027, 1032; N.Y. Lab. L. §577(1)(b)(4). If Plaintiffs prevail before this Court, it is possible that there will be a slight general increase in unemployment compensation rates, but that increase would bear equally on all employers.

An employer has less interest in a general unemployment compensation tax increase than a creditor has in money he has loaned. But in *Sniadach* v. *Family Finance Corp. of Bay View, supra,* this Court held that a wage-garnishment statute was unconstitutional because it did not provide for a hearing prior to the garnishment. The Court relied largely on the fact that the statute deprived the debtor of his source of money for current living expenses. 395 U.S. 337, 340. It was made clear, even in purely private litigation, that one may not be deprived of current income necessary to meet day-to-day living expenses without a prior due process hearing. The implication, particularly in light of *Goldberg,* is that a governmentally administered program designed to maintain current income [See S. Rep. No. 628, 74th Cong. 1st Sess. 10-13 (1935) (hereafter referred to as "S. Rep.")], cannot permit a deprivation of income without a prior hearing merely because it may potentially result in some increase in the general tax rate imposed on the taxed segment of the population. This is precisely the situation in unemployment compensation—it is possible that the general tax rate imposed on all employers will increase as a result of increased expenses, but individual employers have no more specific interest in such an increase than has a property owner in a legislatively imposed property tax increase.

Unemployment compensation, quite simply, is a government taxation and benefit distribution program which affects employers uniquely only insofar as they, for reasons of economic policy, are the taxed portion of the population.

3. Unemployment Insurance Benefits Meet Current Economic Needs of Recipients.

In the State of New York in the year 1967 more than 40% of the recipients of unemployment compensation earned less than $3000 in their base period (the year prior to application for unemployment insurance) and more than 70% earned less than $5000. New York State Department of Labor, *Unemployment Insurance Beneficiaries* (March, 1970). Even the maximum New York State unemployment benefit of $75.00 per week is obviously used by people with such low incomes to meet day-to-day living expenses.* It was precisely this type of hardship, imposed by deprivation of income necessary to meet such expenses, which led this Court in *Goldberg* to note:

> "The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." 397 U.S. 254, 265.

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* In the Brief of Appellants at 22, it is urged that the fact of lower unemployment insurance payments for persons with lower salaries in their previous employment indicates that need is not relevant in unemployment insurance. This overlooks the fact that unemployment insurance pays a higher percentage of the lower salaries than of higher salaries. See, Cal. Unempl. Ins. Code §§1275, 1280, 1281, N.Y. Lab. L. §590. Further, the fact that there is a minimum amount of earnings required before one is eligible for unemployment insurance does not indicate that need is not relevant in unemployment insurance, but rather that Congress has decided that those without attachment to the work force should have their needs met by a program other than unemployment insurance.

Similarly, in *Sniadach*, this Court said:

> "A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support." 395 U.S. 337, 340.

Notwithstanding the authority of *Sniadach*, with its emphasis on the importance of current income to meet living expenses, the majority in *Torres* v. *New York State Department of Labor*, 70 Civ. 2408 (S.D.N.Y. Jan. 7, 1971) said:

> "In the absence of 'brutal need' on which the court rested its decision in *Goldberg*, the governmental interests to which the Court referred [referring to *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 807 (1970)] must be held to outweigh plaintiffs' claim." Slip Opinion, p. 12.

In his dissent Judge Lasker took issue with this conclusion:

> "I differ with my brothers in that I cannot conclude as easily as they that a beneficiary of unemployment compensation whose payments are terminated does not fall within the category of 'brutal need.'" Slip Opinion, Concurrence and Dissent, p. 1.

In the case at bar, of course, the Court below specifically found the requisite need. Perhaps even more to the point, there is really no reason to think that one's need must be "brutal" before the traditional constitutional protections enjoyed by an American citizen when he deals with his government are brought into play. In this connection the remarks of Judge Wollenberg in *Crow, supra*, are in point:

> "The State argued in *Java*, as the Federal government argues here, that the controlling factor in *Goldberg*

was the 'brutal need' which characterizes the case of the typical welfare recipient.

• • • • •

"Defendants conclude with the argument that since Mrs. Crow does not lack 'the very means to live' she is not entitled to 'the extraordinary remedy of a pre-determination hearing . . . .'

"Defendants misread *Java, Goldberg,* relevant California statutes, and the recent history of American jurisprudence. . . . The Supreme Court invoked the 'brutal need' of the welfare client, not to give him special rights not enjoyed by others, but as part of the balancing process which had been employed in previous due process cases . . . ." Slip Opinion, pp. 8-9.

In other words there is no absolute test of brutal need, but rather there is a balancing of individual needs against government interest. The *Torres* majority, in the above quote, came quite close to adopting an absolute test when it said that in the absence of brutal need the governmental interests outweighed Plaintiffs' claim.

The *Torres* majority found inadequate need for two reasons: (1) eligibility for unemployment compensation is not, as a matter of legislative policy, based on a determination of need, Slip Opinion, p. 11, and (2) recipients denied unemployment compensation may qualify for welfare, Slip Opinion, p. 11. As to the former rationale, the Court below correctly found unemployment compensation recipients to be actually "needy." 317 F. Supp. 875, 878. Moreover, and contrary to the *Torres* majority's position, unemployment compensation, like welfare, was designed to meet this need. H. Rep. No. 615, 74th Cong. 1st Sess. 7-9 (1935). The

absence of a need test in unemployment compensation does not mean that unemployment benefits were not intended to meet actual current needs; this conclusion follows inevitably from the House and Senate Committees' references to the importance of unemployment benefits as an *alternative* to welfare. H. Rep. at 7; see also, S. Rep. at 10-13. Congress intended to remove the psychologically debilitating necessity of reliance on welfare for those regularly attached to the work force. 79 Cong. Rec. 5468 (1935). The very need which required welfare required its alternative, unemployment compensation:

> "It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error. Unemployment insurance is a compulsory governmental program, and in our society we make use of governmental compulsion only when there is a clear and urgent need for it.
>
> • • • • •
>
> "If in 1935 we had not judged that there existed a need which individuals were incapable of meeting by themselves, unemployment insurance would not have been established . . . ." Becker, *The Adequacy of Benefits in Unemployment Insurance* in *In Aid of the Unemployed*, 80-81 (Becker ed. 1965).

In unemployment compensation, need is presumed from the fact of unemployment. Its reality is made clear by the poverty-level income of recipients, as reflected in statistics such as those from New York State, see *supra*, p. 8.

The availability of welfare is not an adequate response to this need. The availability of welfare is not so simple a

matter as the *Torres* majority supposed. If a father remains in the home with his family, the family would not be eligible for any federally-assisted welfare payments in twenty-seven states because they do not have the optional Aid to Families with Dependent Children—Unemployed Parent program (see 42 U.S.C. §607) which provides for federal reimbursement for such payments. United States Department of Health, Education and Welfare, *Public Assistance Statistics, July 1970* at Table 8. Similarly, persons without children who are not blind, disabled or aged would not be eligible for federally-assisted programs in any state. See 42 U.S.C. §§301 *et seq.*, 401 *et seq.*, 601 *et seq.* and 1201 *et seq.* Such persons would be thrown back on their resources, however meager, unless they could convince their welfare departments that they qualified for the state or county general or emergency assistance programs. These programs, however, offer only the most haphazard assistance:

> "General Assistance is the last operating vestige of the poor laws in Public Assistance. Since the funds for this program come from local sources, for the most part, and since the local administering body can set the rules within very broad, if any, State legal limits, there is a marked absence of broad social purpose in the programs.
>
> "This type of aid often is the only resource for many temporarily or permanently unemployable persons and persons out of work who cannot qualify for Unemployment Insurance or whose benefits under that program are inadequate or have been exhausted. However, 4 States will not pay General Assistance to a family with an employable person in the household except in certain dire emergencies.

"State and local GA programs are generally more limited than the Federally aided assistance programs as to the duration and the amount of assistance paid. In 12 States, only emergency or short term assistance is given; in 14 States, aid is restricted to defined special situations. In addition, six States limit the length of time an eligible person can get General Assistance. In many others limitations are set from time to time because of limitations on available funds. A maximum is set on the amount of General Assistance that can be given to a needy person in 14 States. Average monthly payments for all the States reporting in April 1968 amounted to $45 monthly per recipient (ranging from $3.70 in Arkansas to $75 in Pennsylvania). Money payments are made in only about one-half of the State programs; the remaining use either vendor payments or both cash and vendor payments." President's Commission on Income Maintenance Programs (Heineman Commission, appointed 1968), *Background Papers* (1969) at 279 (hereafter cited as *Background Papers*).

Since employability is a requirement of eligibility for unemployment compensation, persons found ineligible for unemployment insurance for reasons other than unemployability would not be able to obtain general assistance in the four states to which the Commission refers in the second paragraph. Apparently New Mexico now has no general assistance program whatsoever. See *New Mexico ex rel. Johnson* v. *Goodwin*, C.A. 42552 (Dist. Ct. Santa Fe Cty. Complaint filed Dec. 2, 1970). The difficulty with relying on state supported general assistance to meet the needs of unemployment compensation recipients pending a hearing

is highlighted by the following comment on the California general assistance program as it existed in 1962:

> "Income not present but forthcoming, *e.g.*, during a penalty period under Unemployment Compensation, will render an individual ineligible." *Background Papers* at 282.

In other words many persons awaiting unemployment compensation hearings were specifically excluded from general assistance. The Heineman Commission concluded:

> "While the AFDC-UP program and the General Assistance program in some localities can supplement the income of families headed by employable men, in practice most are excluded by stringent asset tests and the nonfinancial eligibility requirements imposed." President's Commission on Income Maintenance Programs, *Report (Poverty Amid Plenty, The American Paradox)* at 124 (1969).

Even assuming the availability of some form of public assistance to those whose unemployment compensation is terminated, it should not be used to finance the unemployment insurance hearing process. Congress enacted a comprehensive Social Security Act in 1935 which was intended to meet the minimal economic needs of American citizens and particularly those rendered destitute by the Depression of 1929. See generally, Altmeyer, *The Formative Years of Social Security* (1966) at 3-42. As part of that act Congress determined that those persons who were regularly attached to the work force but deprived of current income by reason of unemployment should be assisted with pay-

ments from an employer-financed program of unemployment compensation. To urge that other federal or state welfare programs should be used to meet the needs of these people while their unemployment compensation is terminated pending a hearing is to force the federal and state governments to finance unemployment compensation from general revenues rather than from the employer tax, contrary to Congressional intent.

To finance unemployment insurance hearings from welfare funds is also administratively inefficient and unduly burdensome to the recipient. It is administratively inefficient because it forces two government agencies to make decisions as to eligibility for benefits before it allows those benefits to vest so that they continue uninterrupted until there is a due process hearing. It would seem much simpler to require uninterrupted unemployment insurance payments pending a hearing. This would also have the effect of requiring that due process requirements in unemployment compensation be financed from unemployment insurance funds rather than from welfare funds. Financing unemployment insurance hearings with welfare also burdens the recipient by forcing him to make applications for welfare benefits which he desperately needs before a final determination of his eligibility for unemployment compensation has been made.

4. Entitlement to Unemployment Benefits Is Determined by an Initial Determination of Eligibility Which Extends to the Employers All That Due Process Requires.

In California entitlement to unemployment benefits is determined as an initial matter on the basis of an exhaustive investigation of all sources of information, including

the employer. See Cal. Unempl. Ins. Code §§1327 *et seq.* As the Three-Judge Court below noted, the investigation procedure prior to a determination provides ample opportunity for the claimant's previous employer and any other interested person to present facts which may affect the claimant's eligibility for benefits. 317 F. Supp. 875, 877-878.

Copies of certain forms completed by the unemployment compensation claimant are sent to his previous employer for verification, and the employer is bound to submit, within ten days, "any facts then known which may affect the claimant's eligibility for benefits." Cal. Unempl. Ins. Code §1327. If the employer raises an issue as to eligibility the claimant may then be asked to complete an additional form which asks for more detailed information about the termination of the claimant's job. The investigation does not stop here, however. According to the Local Office Manual used in California, the employment interviewer has the duty "to seek from any source the facts required to make a prompt and proper determination of eligibility." L.O.M. §1400.3. At the Eligibility Rights Interview with the claimant, the employment interviewer is *required* to "make telephone contact with other parties" in order to verify the representation of the claimant. L.O.M. §1404.4. If the "other parties" cannot be contacted at the time of the Interview, they are to be contacted thereafter by letter for verification. L.O.M. §1404.4. Additionally, all interested persons must be permitted to "'contradict, refute, or explain any evidence [which is relevant]." L.O.M. §1404.4. After the Interview with the claimant, the actual decision may be suspended for an additional ten days to get further information. L.O.M. §1400.3. If the claimant has given any evidence which is "adverse to his [the employer's] interests," the

employer must be offered an opportunity to "contradict, refute, or explain" that evidence. L.O.M. §1400.5. Additionally, if the employer's information "does not clearly resolve [any] issue, [the employer] must be given an opportunity to provide additional information." L.O.M. §1400.5.

Having completed this extensive investigation, the employment interviewer then considers the evidence and makes a determination as to eligibility. The Department itself proclaims that this "determination is the point at which any issue affecting the claimant's eligibility is decided." L.O.M. §1400.1.

The employer is afforded every opportunity to submit evidence and to contradict any evidence submitted by the claimant. The thoroughness of this employer-oriented investigation illustrates the necessity for the claimant to be heard before the decision based on that investigation is subsequently modified.

Despite the initial determination of eligibility, a subsequent employer appeal within ten days automatically suspends benefits.* There is no adequate policy justification for this suspension. As noted above, the employer is in no way harmed, even by erroneous payments. The recipient, however, is usually desperately in need of income; without it he suffers tremendous hardship.

By requiring prior termination hearings, there may arise some administrative inconvenience and additional expense. But such an effect is not insurmountable. This

*The time for filing an appeal varies from state to state. In New York a much longer period of 30 days is allowed. N.Y. Lab. L. §620(1).

is adequately demonstrated by the successful implementation of the Rhode Island unemployment compensation statute which requires that an eligible claimant's benefits *not* be suspended when an employer appeals. See Gen. Laws of R. I. 28-44-40 (1968). And, of course, administrative convenience and additional expense alone cannot justify the deprivation of important constitutional rights. *Goldberg* v. *Kelly, supra* at 265-266.

B.

The automatic suspension of plaintiffs' unemployment compensation benefits after an initial determination of eligibility violates controlling provisions of Federal law.

1. The Automatic Suspension of Benefits Pending Appeal Does Not Result in Payment of Benefits "When Due" as Required by 42 U.S.C. §503(a)(1).

The Court below found the California practice of benefit suspension to violate the United States Constitution by not providing prior hearings *and* to violate 42 U.S.C. §503(a)(1) by not providing benefits when due. 42 U.S.C. §503 provides:

> "(a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor to be *reasonably calculated to insure full payment of unemployment compensation when due; . . .*"
>
> 42 U.S.C. §503(a)(1) (emphasis supplied).

The Court below found that the median delay between an employer appeal and the resumption of benefit payments is seven weeks and that this delay violated the statutory requirement of payment "when due."* In view of the holdings in recent cases and of the legislative history of unemployment compensation, the Court below was correct.**

Welfare programs based on federal statutes which require the payment of benefits to eligible individuals create statutory "entitlements" in favor of the eligible. *Goldberg* v. *Kelly, supra; Shapiro* v. *Thompson,* 394 U.S. 618, 627 n. 6 (1969); *King* v. *Smith,* 392 U.S. 309 (1968). Numerous cases have followed the decisions of this Court and found a statutory entitlement to welfare based on 42 U.S.C. §602 (a)(10) (Supp. V 1965-69), which provides that a state welfare plan must "provide . . . that aid . . . shall be furnished with reasonable promptness to all eligible indi-

* The situation in California is not unique. For example, for the period July to September, 1969, in New York, more than thirty days elapsed between the hearing demand and actual hearing in 98% of the cases; and 73.2% of the cases involved delays in excess of forty-five days. See United States Department of Labor, *Unemployment Insurance Statistics* (1969) at Table 17.

** The Three-Judge court in *Torres* v. *New York State Department of Labor,* 70 Civ. 2408 (S.D.N.Y. January 7, 1971) concluded that New York's practice did not conflict with 42 U.S.C. §503(a)(1) despite the absence of prior hearings. This holding was based solely on the finding of the United States Secretary of Labor that New York's practice complies with the requirements of federal law. While such administrative interpretations are entitled to serious consideration, *Lewis* v. *Martin,* 397 U.S. 552, 559 (1970) (state regulation invalid because in direct conflict with specific federal regulation), the general approval by a federal administrator of a state plan does not confer any immunity to legal challenge or curtail judicial scrutiny and relief. *Rosado* v. *Wyman,* 397 U.S. 397, 420 (1970).

viduals." See, *Cooper* v. *Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970) (state cannot reduce welfare grants to make up for past overpayments); *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969) (state cannot deny benefits to illegitimate children because mother refuses to reveal name of putative father); *Damico* v. *California*, No. 46,538, CCH Pov. L. Rep. ¶10,748 (N.D. Cal., Sept. 12, 1969) (state cannot impose three month waiting period prior to welfare payments). The similarity between 42 U.S.C. §602(a)(10) and 42 U.S.C. §503(a)(1) is immediately apparent. One can only conclude that §503(a)(1) creates a similar entitlement and that payments must be made once a claimant is initially determined to be eligible.

The legislative history of unemployment compensation leads to the same conclusion. Unemployment compensation was not intended to provide an unlimited amount of compensation to all who are unemployed. "Any attempt to make it do so confuses unemployment compensation with relief, which it is designed to replace in large part. It can give compensation only for a *limited period* and for a percentage of the wage loss." *H. Rep.* at 7 (emphasis supplied). See also, *S. Rep.* at 10-13. Compensation is made available for a limited period on the assumption that the worker, with the support of his benefits, will seek and find new employment during the period in which he is receiving benefits, and that once he achieves his goal, unemployment compensation is no longer necessary. The crucial period, therefore, in which the immediate need for compensation arises, and at which the Act is directed, is the period of unemployment. This is when unemployment compensation is "due" under Section 503(a)(1) of the Act. It is clear that retroactive payment of benefits after a hearing, which

may be held *after* new employment is obtained, does nothing to secure this purpose.

Congress also passed the Act to "enable most workers who lose their jobs to tide themselves over, until they get back their old work or find other employment *without* having to resort to relief . . ." *H. Rep.* at 7 (emphasis supplied). To insure that unemployed workers will not be required to resort to welfare, it is essential that state procedures provide for the payment of unemployment compensation benefits during the initial stage of unemployment. The California procedure here at issue offers no such protection.

Unemployment compensation was viewed by the Congress as a right. The legislative history of the federal provisions clearly reflects the idea that unemployment compensation was *not* considered charity:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief." 79 *Cong. Rec.* 5468 (1935).

As in welfare cases we deal with a "statutory entitlement." In order to protect this entitlement to unemployment compensation, 42 U.S.C. §503(a)(1) requires state procedures "to be reasonably calculated to insure full payment of unemployment compensation when due." Cali-

fornia's practice is not in conformity with this standard. Plaintiffs were ruled eligible for their statutory entitlements by the Department when they were unemployed. This was the time during which Congress intended benefits to be paid. The California practice of automatic suspensions for an average of seven weeks whenever an employer requests an appeal prevented receipt of those benefits during a substantial portion of the time the recipients were unemployed and it conflicts with this clear congressional intent.

2. There Is a Federal Court Remedy for Persons Aggrieved by Violations of the Social Security Act by the State of California.

As noted above, it is now settled that welfare recipients may challenge the administration of local welfare programs which violate the Federal Social Security Act. See, *supra,* pp. 19-20. Unemployment compensation is part of that Act. For present purposes, it is identical to welfare: There is a federal statute with which the state programs must conform, 42 U.S.C. §503(a), and there is a provision for the holding of hearings to determine whether or not the state program is in conformity with the federal statute. Compare 42 U.S.C. §503(b) and (c) with 42 U.S.C. §604(a). In *Rosado* v. *Wyman,* 397 U.S. 397 (1970) this Court dealt with an identical situation. The state defendant urged that the conformity hearing was the sole method of testing the adequacy of its welfare program. This Court specifically addressed this issue saying:

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds

by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. 397, 420.

The Court below correctly reached the same result for unemployment compensation.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief of Appellees

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In the Supreme Court of the United States

October Term, 1970

No. 507

California Department of Human Resources Development, et al.,
Appellants,

v.

Judith Java, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief of Appellees

OPINION BELOW

The opinion of the United States District Court for the Northern District of California is reported at 317 F. Supp. 875 (1970). It is also included in the Joint Appendix at 133.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state . . . shall . . . deprive any person of life, liberty or property without due process of law. U. S. Const. Amend. XIV, Section 1.

42 U.S.C. 503(a)(1) provides:

> § 503. STATE LAWS, PROVISIONS REQUIRED: STOPPING PAYMENTS ON FAILURE TO COMPLY WITH LAW
>
> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> (1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;

Section 1335 of the California Unemployment Insurance Code provides as follows:

> 1335. If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:
>
> (a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or
>
> (b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the

director, Appeals Board, or other administration body or by any court.

If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination.

QUESTIONS PRESENTED

1. Is a procedure that assures the withholding of weekly unemployment benefits for lengthy periods from recipients who have been found eligible after State investigation "reasonably calculated to insure full payment of unemployment compensation when due," as required by 42 U.S.C. 503(a)(1)?

2. Does a procedure which cuts off unemployment benefits from eligible recipients without a prior hearing pending a decision on an employer's appeal violate due process of law?

STATEMENT OF CASE

This class action challenges that part of Section 1335 of the California Unemployment Insurance Code which prohibits the continued weekly payment of unemployment insurance funds to recipients who have been determined eligible by a State investigation but whose last employer has appealed that decision to a State referee.

Appellees Java and Hudson and the class they represent are wage earners, recently out of work, and unable to find new employment. Prior to their loss of employment, they earned sufficient wages in employment covered by the California Unemployment Insurance program to qualify for the receipt of benefits. They filed claims for unemployment benefits, and, after an eligibility investigation by the California Department of Human Resources Development [hereinafter "Department"] based on information provided

by all relevant parties, were determined eligible and began receiving weekly benefits. Sometime thereafter, their determinations were appealed to a State referee by their last employers. Pursuant to California Unemployment Insurance Code § 1335, no further payments were permitted pending decisions on appeal, despite the fact that the Department's favorable eligibility determinations remained unchanged. In the interim, both Mrs. Java and Mrs. Hudson were forced to apply for welfare to support their minor children.

Prior to the referee hearings, this action was filed to enjoin enforcement of Section 1335 on the ground that plaintiffs, as *eligible* recipients, had a constitutional and federal statutory right to the continuation of their benefits pending their former employers' appeals. On May 14, 1970, the three-judge district court issued a preliminary injunction enjoining the State from suspending the unemployment benefits of eligible recipients "on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly.*" (A. 140).

After reviewing the Department's eligibility determination in great detail, the court found that it is based on a thorough investigation with all sides having an opportunity to be heard and "is the critical point in the California procedure." (A. 136). Relying on *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the court below held that suspending unemployment benefits from an *eligible* unemployment recipient pending an employer appeal without affording the recipient a *prior* opportunity to be heard violates due process.

Moreover, the court found that because of suspensions pending appeal:

> Some five thousand *eligible* recipients each year in California find their payments halted for a median period of seven weeks. Since the average period of unemployment in California is . . . some nine weeks, [the median period of unemployment is seven weeks. (A. 11)], it is clear that as to these people, payments are not made "when due." (A. 139).

The court also noted that lengthy suspensions of unemployment benefits serve to drive unemployment recipients to welfare—a result directly contrary to the Congressional purpose in enacting the Social Security Act (A. 130). Basing its holding on these two factors—that benefits are delayed beyond the time the average recipient has need of them, and that relegation to welfare was one of the consequences of unemployment that Congress meant to prevent—the court held that California's procedures under Section 1335 were not reasonably calculated to assure full payment of unemployment benefits when due and therefore violated the Social Security Act (A. 139).

The injunction issued by the district court has been in continuous effect since May 24, 1970. Since that date, all eligible unemployment recipients have received weekly benefit payments pending their employer's appeal.

It is well to clarify at the outset what is *not* involved in this case. Appellees raise no issue concerning the procedural safeguards to be afforded claimants who are initially determined *ineligible* and file appeals from that decision. This factual situation is clearly distinguishable from the one before the Court: the appellees have been found *eligible* by the State for unemployment benefits, and their benefits have been cut off solely due to an employer's appeal.

Further, this case does not involve an unemployment insurance procedure wherein a claimant is eligible for benefits merely by filing a prima facie claim, with no Departmental

investigation until an employer files an appeal asking to present his side of the case. On the contrary, the California claimant does not receive benefits until after his employer has been notified of the claim and has had an opportunity to present his evidence to the Department examiner. The claimant and his employer are provided opportunities to rebut each other's statements, both orally and in writing. The Department examiner makes a written decision only after extracting and weighing the evidence submitted by all sides (A. 136, 117-123).

Finally, this is not a case in which an employer who is successful in appealing a state eligibility determination is individually responsible for payments made pending appeal. If a California employer succeeds in reversing a determination of eligibility at any appellate level including judicial review, he is not individually liable for any benefit payments made as a result of that determination. *Cal Unemp. Ins. Code* § 1335.

SUMMARY OF ARGUMENT

I

In enacting the Social Security Act, Congress intended unemployment compensation to serve three distinct purposes: (1) to enable workers to survive temporary periods of unemployment without having to resort to relief, (2) to help workers in their efforts to find reemployment, and (3) to maintain purchasing power at the onset of an economic downturn. These objectives all require the payment of weekly unemployment benefits during the initial stages of unemployment. In order to assure that unemployment benefits be payable and due to workers at this time, Congress provided that State unemployment procedures "be reasonably calculated to provide full payment of unemployment compensation when due." 42 U.S.C. 503(a)(1).

In California, an initial eligibility determination is made on the basis of a thorough factual investigation affording all parties an opportunity to be heard. Once determined eligible, a claimant begins receiving benefits. Upon an appeal by an employer to a State referee, all benefits are immediately cut off pending the decision on appeal. A median period of seven weeks passes before such decision is rendered. *Calif. Unemp. Ins. Code* § 1335. In deciding whether to suspend benefits, no consideration is given to the merits of the recipient's case.

If the initial eligibility determination is affirmed by the State referee, as 64 percent are, payments are made retroactively in a lump sum. Since the median length of time an unemployed worker is entitled to receive benefits is also 7 weeks, it is probable that an *eligible* employee, whose employer has filed an appeal, will receive no benefits until a time in which he is no longer qualified for unemployment compensation. In the interim, although found fully eligible for benefits by the relevant State agency, he somehow is required to survive without the use of unemployment funds.

By assuring that a large number of *eligible* employees do not receive benefits until long after their initial period of unemployment, the California disbursement procedures undermine all three objectives of the federal statute—especially the desire of Congress to assure that involuntarily unemployed workers do not have to resort to welfare in order to survive. The court below held, therefore, that the California procedure was not "reasonably calculated to insure the payment of unemployment compensation when due" as required by 42 U.S.C. 503(a)(1).

II

Upon the filing of a claim for unemployment compensation in California, a thorough factual investigation is con-

ducted in which all interested parties are given a full opportunity to be heard. A written decision is then rendered concerning the claimant's eligibility for unemployment benefits. The court below found that this determination is "the critical point in the California procedure." If found eligible, the claimant begins receiving weekly benefits. Upon the filing of an employer's appeal, however, his benefits are summarily cut off regardless of the merits of his case. He is afforded no opportunity to be heard before these benefits cease to flow.

The deprivation of unemployment benefits causes *eligible* recipients irreparable economic injury. Although unemployment funds provide greater security and dignity, they were designed by Congress to serve much the same purpose for involuntarily unemployed workers as public assistance serves for the blind, disabled, young, and aged. Both provide only subsistence benefits. Although financed under insurance principles, benefits schedules are based on need. Average need rather than individual need is utilized so that workers, who become unemployed through no fault of their own, are not compelled to undergo a humiliating "means" test. Without unemployment benefits, an *eligible* recipient may have nowhere to turn for support. By definition, he is involuntarily unemployed and hence, unable to find work. Moreover, since low income workers are the most frequent victims of involuntary unemployment, it is highly unlikely that an unemployment recipient will have sufficient savings to withstand the incipent stages of unemployment. Welfare often is not a viable alternative: in order to qualify for welfare, an individual must fit into one of several categories; eligible unemployed workers, especially those who are single and/or male, usually are not able to qualify. Furthermore, Congress clearly intended unemployment

compensation to provide security to unemployed workers without relegating them to public assistance.

An *ex parte* suspension of benefits from *eligible* employees pending an employer's appeal is an inherently arbitrary procedure. Benefits are cut off not by a Departmental redetermination but by the action of an adverse third party. No consideration is given to the merits of a recipient's case. Sixty-four percent of the appeals filed by employers are decided in favor of their former employees. An opportunity to be heard prior to the suspension of benefits would have enabled all of these employees to receive their benefits when they were most desperately needed.

No extraordinary or special situation justifies an *ex parte* suspension of unemployment benefits. Potential losses to the Unemployment Fund as a result of overpayments pending appeal are *de minimis*. Where overpayments do occur, the State has ample recoupment powers.

Nor are the interests of the State's employers adversely affected by the payment of benefits to *eligible* employees pending an employer's appeal. If at any appellate level, an employer succeeds in reversing an eligibility determination in favor of his former employee, he bears no responsibility for any payments that may have been made in the interim.

Unemployment benefits often provide desperately needed funds to involuntarily unemployed workers. An opportunity to be heard prior to the termination of benefits has been held constitutionally required for welfare recipients. Due process requires the same procedural safeguards for the "working poor."

ARGUMENT

I. The Procedures Authorized by Section 1335 of the California Unemployment Insurance Code Violate the Social Security Act by Denying Unemployment Benefits to Eligible Workers When Due.

A. CONGRESS INTENDED THAT UNEMPLOYMENT BENEFITS BE DUE DURING THE INITIAL STAGES OF UNEMPLOYMENT.

The Social Security Act of 1935, as amended, 42 U.S.C. 501-503, 1101 et. seq., and the Federal Unemployment Tax Act, as amended, 26 U.S.C. 3301-3309 set forth substantial tax and fiscal benefits for states that participate in the federal unemployment compensation program.[1] States that receive these benefits must, under the principle of "cooperative federalism," *King v. Smith,* 392 U.S. 309, 316 (1968), administer their unemployment compensation system in conformity with basic federal standards found in 42 U.S.C. 501-503, 1101 et. seq. and 26 U.S.C. 3301-3309. As this Court pointed out in upholding the constitutionality of the unemployment compensation scheme in *Steward Machine Co. v. Davis,* 301 U.S. 548, 594 (1937): "What they [the States] may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental." *Cf. Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143 (1947).

Section 503(a)(1) of the Social Security Act provides in part:

> (a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he

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1. These benefits are indeed substantial. In 1968, for example, California's participation in the federal unemployment compensation program entitled it to receive $90,085,000 from the federal government for reimbursement of its administrative costs. *U.S. Statistical Abstract,* Table 571, 383 (1970). And, in 1963, such participation entitled its employers to credit $320,544,000 against the federal tax on employers. Note, 73 *Yale L.J.* 357, 358, n. 8 (1963).

finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . .

The procedures authorized by Section 1335 of the California Unemployment Insurance Code are not "reasonably calculated to insure full payment of unemployment compensation when due." They undermine the fundamental purposes of the unemployment sections of the Social Security Act and render its goals less attainable.

The phrase "when due" is nowhere authoritatively defined. However, an examination of the reasons for unemployment insurance, as reflected in the legislative history of the Act and in commentary upon it, reveals that "when due" must mean during the initial stages of unemployment—the period in which it is clearly possible: (1) to maximize the opportunity for the unemployed to seek and find substantially equivalent employment with minimum privation and discomfort and without having to resort to public assistance; and (2) to prevent losses of purchasing power by the unemployed which could be irreparably damaging to the economy. Thus, if state procedures are to be considered "reasonably calculated to provide full payment of unemployment compensation when due," they must assure that payment of unemployment benefits to *eligible* workers begins during the initial stages of their unemployment.[2]

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2. Under the California scheme, a formal determination of eligibility based on a thorough factual investigation in which all interested parties are offered an opportunity to be heard is made in the third week following an unemployment insurance claim. *Infra* at 27-32. (A. 136, 128-129). Claimants found *eligible* and

To minimize the hardships unemployment visits upon unemployed workers and to avert the kind of catastrophic depression which occasioned the Social Security Act are the principal goals of our unemployment insurance system. "For the great bulk of industrial workers, unemployment will mean security during the period following unemployment when they are seeking another job, or waiting for a return to their old positions." *S. Rep.* No. 628, 74th Cong., 1st Sess. 12 (1935) [hereinafter *"S. Rep."*]. Unemployment compensation is intended to "maintain purchasing power at times when most needed, and [to] encourage the regularization of employment." *S. Rep.* at 16.

The Social Security Act was passed to "enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment without having to resort to relief . . . ." *H. R. Rep.* No. 615, 74th Cong., 1st Sess., 7 (1935) [herinafter *"H. R. Rep."*]. As its draftsmen indicated, it was designed to "carry workers over most, if not all, periods of unemployment in normal times, without resort to any other form of assistance." *Report to the President, Committee on Economic Security, Hearings on S.* 1130, *Senate Committee on Finance*, 74th Cong., 1st Sess. 1321-22 (1935) [hereinafter *"S. Hearings"*].

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thereby entitled to benefits during the initial stages of their unemployment must be carefully distinguished from those initially found *ineligible*, but who, sometime later, win appeals from that decision thereupon receiving benefits. Since the State has no way of learning that *these* claimants are eligible until they win their appeals, it can hardly be expected to pay them benefits during the pre-appeal period, even though the appellate hearing and subsequent commencement of benefits may take place after the "initial stages of unemployment." Thus, a State procedure that denies benefits pending appeal to claimants found ineligible while assuring payment to those determined eligible can still be considered "reasonably calculated to insure the full payment of unemployment compensation when due," so long as it affords ineligible claimants an opportunity for a timely appeal.

Thoroughly familiar with the plight of workers "thrown out of work suddenly,"[3] the 1935 Congress recognized the pressing need for "security during the period following unemployment." *S. Rep.* at 12. Welfare, however, was believed to be a particularly inappropriate means of sustaining workers during temporary periods of unemployment. As brought out on the House Floor by the Chairman of the Committee on Ways and Means:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. *Remarks of Representative Doughton,* 79 *Cong. Rec.* 5468 (1935).[4]

Moreover, serious doubts were raised about the ability of welfare to provide the relief sought: In a period of economic downturn, a system such as welfare, dependent for financing upon general tax revenues which themselves fluctuate with the state of the economy, might well be inadequate to the task of providing large numbers of unemployed workers with sustenance. Private charity also had proven itself unable to provide the fiscal organization and resources necessary to meet the exigencies of mass unemployment. See *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87 (1937); Note, 73 *Yale L. J.* 357, 359 (1963).

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3. *Statement of Harry L. Hopkins, Hearings on H. R.* 4120, *House of Representatives, Committee on Ways and Means,* 74th Cong., 1st Sess. 214 (1935) [hereinafter "*H. R. Hearings*"].

4. *See also, Douglas, Standards of Unemployment Insurance* 20 (1933).

Unemployment insurance, therefore, was enacted as an alternative to welfare, private charity, and relief. To avoid stigma, it was considered "a contractural right not dependent on any means test." *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22.[5] Furthermore, the availability of benefits in periods of economic crisis was assured by accumulating funds in periods of economic prosperity. See *H. R. Rep.* at 7.

In order for unemployment benefits "to replace [relief] in large part," *H. R. Rep.* at 7, in assuring workers "security during the period following unemployment," *S. Rep.* at 12, benefit payments clearly must begin in the initial stages of unemployment.[6] Unemployment benefits serve much the same purpose for workers as public assistance serves for welfare recipients. They provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend." *Statement of Frances Perkins, S. Hearings* at 119. Like welfare, unemployment benefits are "sustaining funds," *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967), "maintain[ing] the normal beneficiary at the subsistence level. . . ." Risenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage Loss*, 8 *Vand. L. Rev.* 218, 240 (1955). As an alternative source of subsistence funds, unemployment insurance was designed to "very materially reduce the cost of relief in future years." *S. Rep.* at 12. However, any substantial delay in commencng benefit pay-

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5. *See also, Statement of Edwin E. Witte, Executive Director, Committee on Economic Security, S. Hearings* at 216 (1935).

6. Citing from the Report of the President's Committee on Economic Security, two commentators stated that unemployment insurance was intended "as a 'first line of defense' *at the earliest possible date* to increase the security of all who are unemployed." Larson and Murray, *The Development of Unemployment Insurance in the United States*, 8 *Vand. L. Rev.* 181, 186 (1955) (emphasis added).

ments increases the number of unemployed workers who are forced to turn to relief, thereby undermining the Congressional purpose in establishing a separate insurance scheme for the labor force.

Unemployment insurance was also designed to financially assist unemployed workers in their efforts to find new employment.[7] President Roosevelt urged that "unemployment compensation should be set up under conditions which tend towards the regularization of employment." *S. Rep.* at 14. In explaining to the House Ways and Means Committee the reason why the draftsmen of the Social Security Act chose to pay unemployment benefits rather than directly provide work, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash. *Statement of Harry L. Hopkins, Federal Emergency Relief Administrator, H. R. Hearings* at 214.

If labor is able to flow from pockets of unemployment to areas where jobs are available, employment becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. But the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are not available until months elapse from the time he initially becomes un-

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7. Only those unemployed workers who are able and available for work are eligible for unemployment benefits. *Calif. Unemp. Ins. Code* §§ 1253, 1257-59.

employed. The funds which might have been used to increase labor mobility may instead have to be spent on basic necessities. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Thus, the opportunity to find employment diminishes to the extent that payments are delayed. As a result, delayed payments often increase the time necessary to find employment, and necessitate greater withdrawal from the State's Unemployment Insurance Fund than if payments were made during the initial stages of employment.[8]

Both the national economy and the unemployed worker benefit when purchasing power is maintained during periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." *H. R. Rep.* at 7. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 596, n. 13 (1937). Unemployed workers, during the period in which they receive no compensation, are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms, which in turn causes further unemployment, and eventually, economic depression. Maintenance of purchasing power, on the other hand, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Society Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the

8. California justifies its present scheme of delaying payments to eligible recipients in the event of an employer appeal as one means of preventing depletion of its Unemployment Fund. Ironically, such delays may instead *increase* the burden on the Fund by lengthening the period of unemployment and hence, the period of eligibility for benefits.

stabilization of industry. . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity. *S. Hearings* at 2.

Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security, which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance, come to a recognition that the small merchants of a locality, and those who provided them with their stock, had derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect upon employment in other lines than in that first depressed. *S. Hearings* at 111.

But, for such benefits to be fully realized from the maintenance of purchasing power, it is necessary that unemployment benefits begin in the critical initial stages of unemployment—not in lump sum form, long after unemployment has occurred. Payments must commence "early in the downturn, immediately after unemployment makes its appearance." Clague, *The Economics of Unemployment Compensation*, 55 *Yale L.J.* 53, 69 (1945). The funds are "specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used." *Statement of Senator Robert F. Wagner, S. Hearings* at 3. Early payments enable workers and their families:

> to preserve existing assets, such as homes, furniture, and automobiles, thus avoiding the forced liquidation of assets which aggravates the downturn in business. They encourage more confident spending of other resources, thus helping to avoid a 'freezing' of purchas-

> ing power on the part of millions of workers when they are faced with unemployment. Clague, *supra* at 69.

Whereas lump sum payments[9] may be spent erratically, a steady weekly income, assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries, such as agriculture, food, and clothing." *Id.*

Early payments, "help maintain spending habits at a time when business may be heading downhill." *Id.* at 70. As Secretary Perkins testified before the House Committee on Ways and Means:

> [T]he importance of providing purchasing power for these people, even though temporary, is of very great significance *in the beginning of a depression.* I really believe that putting purchasing power in the form of unemployment insurance benefits in the hands of the people *at the moment when the depression begins and when the first groups begin to be laid off* is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device. By keeping alive certain industries through the expenditure of small but certain unemployment insurance benefits, a stop will be put to this downward spiral of employment and the length of depressions . . . will be reduced. *H.R. Hearings* at 182 (emphasis added).

Congress had three purposes in mind, then, when it enacted its unemployment scheme: providing sustenance and

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9. In 1969, 5,325 *eligible* California unemployment recipients received their unemployment benefits retroactively, *in a lump sum*, due to the suspension of benefits pending unsuccessful employer appeals of eligibility determinations in their favor. J. S. App. C at 14.

security to unemployed workers without relegating them to public assistance, helping unemployed workers find new jobs, and maintaining purchasing power at the onset of any economic downturn. Clearly, Congress must have intended that payments be "due" to eligible workers at a time in their unemployment cycle when these goals would be facilitated rather than frustrated. To accomplish this end, payments must not only commence when a worker is still unemployed; they must also begin during the initial stages of unemployment.

B. BECAUSE CALIFORNIA'S PROCEDURES ASSURE THE DENIAL OF UNEMPLOYMENT COMPENSATION TO MANY ELIGIBLE RECIPIENTS DURING THE INITIAL STAGES OF UNEMPLOYMENT, THEY ARE NOT REASONABLY CALCULATED TO INSURE FULL PAYMENT OF UNEMPLOYMENT BENEFITS WHEN DUE.

To insure payment during the initial stages of eligibility, Congress provided that state unemployment procedures must be "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503(a)(1). As the district court found, the procedures authorized by Section 1335 of the California Unemployment Insurance Code for disbursing unemployment benefits are not so calculated. (A. 139). Whenever a California employer appeals a formal Departmental determination[10] that one of his former employees is eligible for unemploy-

10. As the district court points out (A. 135-137), the eligibility determination is based upon a thorough factual investigation in which all parties have an opportunity to be heard. *See Cal. Unemp. Ins. Code*, §§ 1327, 1328; Local Office Manual §§ 1400.3, 1400.5, 1404.2, 1404.4 (A. 117-121). In 1969, 136,284 claimants who had earned sufficient wages to file a valid unemployment claim were formally found ineligible *at this juncture* because the evidence revealed they had left their last employment under disqualifying conditions. J. S. App. C at 14. An investigation which eliminates such a large percentage of otherwise eligible claimants, as this one does, can hardly be considered perfunctory.

ment benefits, all benefits to that employee are immediately suspended until the appeal is heard and a decision is rendered. *Cal. Unemp. Ins. Code* § 1335. If, as in most cases, the determination is affirmed, benefits are paid retroactively in a lump sum many weeks later.

An employer has an economic incentive to appeal an eligibility determination in his former employee's favor,[11] and benefits are suspended whenever and for whatever reason he files an appeal. *Calif. Unemp. Ins. Code* § 1335.[12] In 1969, 8,315 such appeals were filed by employers. (J.S. App. C at 14). In 64 per cent of the cases, the referee agreed that the employee was entitled to unemployment benefits. Thus, the California procedure resulted in wrongfully denying subsistence benefits for extended periods of time to 5,325 workers who had consistently been found eligible for benefits.

The median length of time between the filing of an appeal and the mailing of the decision is 49 days. (A. 106, 139). That is, 50 per cent of the thus-far eligible unem-

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11. A desire to protect his reserve account is the employer's economic incentive: the amount of money he is required to pay into the Unemployment Fund is based on the number of his former employees who qualify for unemployment benefits. Indeed, he has no reason not to appeal. An employer does not, however, have a direct economic interest in having benefit payments to his former employees suspended pending his appeal; should the employer be successful on appeal, his "reserve account" is immediately credited with all monies that have been paid to his former employee. He has no responsibility for recoupment. *Calif. Unemp. Ins. Code* §§ 1335, 1380.

12. Although good cause must be shown for a late appeal, *Cal. Unemp. Ins. Code* § 1328, benefits are cut off immediately upon such an appeal, with the question of good cause left for the appellate hearing. At the hearing, the first issue is whether the employer had good cause for his lateness. Thus, even when there is no excuse for tardiness and an employer's appeal is not heard on the merits, *eligible* employees are denied necessary benefits for many weeks and often months.

ployed workers whose benefits have been wrongfully withheld must subsist without them for more than seven weeks.[13]

Since the median length of time an unemployed worker receives unemployment benefits is also 7 weeks (A. 122), the California procedure assures that a large number of workers receive their benefits retroactively in a lump sum at a time when they would no longer qualify for current unemployment benefits. Thus, in the event that his employer appeals, an *eligible* worker may receive no weekly benefits during the months when he is unemployed and in desperate need of income, only to receive a lump sum payment some time in the future when he is already back at work.

Clearly then, the California scheme does not result in making payments during the "limited period" between jobs which Congress intended unemployment benefits to cover. *H.R.Rep.* at 7. *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22. As a California legislative study, which successfully recommended the reduction of the waiting period for unemployment benefits to one week, points out: "It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter." *Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature*, 62 (1945). *See also*, Clague, *The Economics of Unemployment Compensation*, 55 *Yale L. J.* 53, 69 (1945).

By providing delayed lump sum payments so late in the unemployment cycle, the procedures authorized by Section 1335 undermine rather than promote Congress' three pur-

13. In 1969, 13% of those workers who benefits were suspended pursuant to Section 1335 were required to survive without them for over 10 weeks. *U.S. Department of Labor, Manpower Administration, Unemployment Insurance Statistics*, Table 17, (March 1970).

poses in passing the federal Unemployment Act. Purchasing power at the outset of an economic downturn can be maintained only with weekly payments for necessities. Unemployed workers cannot hope to find new jobs without money for transportation and other search-related expenses. Finally, without funds for sustenance and security, unemployed workers may be forced to seek public assistance. As the district court points out:

> Defendants [California] urge that public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. This was certainly the primary reason for 42 U.S.C. § 503(a)(1) and the requirement that State programs assure full payment of benefits "when due". (A. 139, 63, 65).[14]

The eligibility determination in California is made on the basis of a thorough factual investigation with all relevant parties having an opportunity to be heard. (A. 136). *Infra* at 27-32. Since it is reached in the initial stages of unemployment, prompt payment upon its completion fulfills the purposes of the Unemployment Act. As the district court found: "There seems little question that this is the critical period in the California procedure. . . . It is clear that in California payments become "due," and are paid, upon the favorable decision of the interviewer."

"When due" in the California context, therefore, is promptly after the eligibility determination. By assuring that a large class of *eligible* recipients are denied benefits until long after that determination, California's disburse-

14. Both of the individual appellees in this case were forced to resort to welfare while the appeals filed by their former employers were being decided. Each has dependent children. If an unemployed worker has no dependent children and is not blind, disabled, or of retirement age, he is ineligible for categorical assistance and must look elsewhere for sustenance.

ment procedures are not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503(a)(1).

The State asserts that the procedures authorized by Section 1335 cannot be inconsistent with the federal Social Security Act because they are based upon model state statutes circulated by the President's Committee on Economic Security—the original draftsmen of the Act—while Congress was debating it.[15] However, these model statutes were never recommended by Congress, nor are they out of harmony with the notion that by requiring unemployment benefits to be paid "when due," Congress meant "during the initial stages of unemployment."

Congress never drafted the model bills or approved them as law. Indeed, there is no evidence that Congress ever considered them in its deliberations on the complex and lengthy Social Security Act:[16] No substantive testimony on the model acts was elicited at the Committee hearings, nor are they mentioned in the Committee reports. Thus, it can hardly be said that the bills were approved, recommended, or circulated by Congress.[17]

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15. Drafts of possible state statutes were sent to the Senate Finance Committee which was conducting hearings on the Social Security Act and were inserted into the record. *S. Hearings* at 602, 623.

16. In addition to unemployment insurance, the Social Security Act created new programs for federal old-age assistance, state old-age assistance, aid to dependent children, aid for maternal and child welfare, aid to the blind and public health.

17. Indeed, not only were these model state acts not circulated, approved, or recommended by Congress, they were never even considered by the members of the President's Committee on Economic Security, the body charged by the President with drafting the federal statute. As Edwin E. Witte, Executive Director of the Committee revealed: "None of this material [the model acts] was ever submitted to the members of the committee, but was sent out on my own responsibility . . ." *E. Witte, The Development of the Social Security Act* 125-26, n. 78 (1963).

Moreover, nothing in the model acts sanctions a long delay in benefit payments to eligible workers. While they do provide for a short stay of benefits to allow an employer an opportunity to be heard,[18] the model acts assure payment during the initial stages of unemployment by providing that "the claim thus disputed shall be *promptly* decided." *S. Hearings* at 603, 623 (emphasis added). Surely the California procedure, under which a significant number of eligible claimants receive their benefits long after they first become unemployed and, in many instances, after they are reemployed and no longer qualified for benefits, cannot be considered to decide claims promptly. The model bills appear to assure with their requirement of promptness that benefits are paid "when due." Because the California scheme allows long-delayed payments, it is inconsistent with both the model acts and the federal statute.

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18. Under California's unemployment procedures, as the district court pointed out, the employer has had a full opportunity to be heard *before* the eligibility determination. (A. 136) *Cal. Unemp. Ins. Code* §§ 1327, 1328; Local Office Manual § 1400.25, 1400.3, 1400.5, 1404.2, 1404.4 (A. 117-123). *Infra* at 27-32. No stay of benefits, therefore, is necessary to provide him that opportunity. Under the Model Acts, however, the employer is apparently not contacted until the Department has determined that the claimant has a claim that is valid on its face. Then a short stay is provided so that the employer can be heard. A similar procedure is found in the District of Columbia. See *D.C. Code* § 46-311(b). Under this procedure, appeals are decided much more quickly in the District of Columbia than in California. Over 51.6 percent of all benefit appeals in the District in 1969 were decided in less than 30 days; only 24.1 percent were decided within a comparable period in California. *U.S. Department of Labor, Manpower Administration, Unemployment Insurance Statistics*, Table 17, (March, 1970). *See also, District Unemployment Compensation Board v. Hahn*, 399 F. 2d 987 (D.C. Cir., 1968). Neither the model acts nor Section 46-311(b) of the District of Columbia Code contemplate a lengthy stay pending appeal. Any substantial delay in paying benefits to *eligible* recipients would constitute a violation of those statutes.

C. THE DENIAL TO ELIGIBLE RECIPIENTS OF UNEMPLOYMENT BENEFITS WHEN DUE IS SUBJECT TO JUDICIAL REVIEW.

Just last term in *Rosado v. Wyman*, 397 U.S. 397 (1970), a case alleging state noncompliance with provisions in the welfare section of the Social Security Act, this Court noted:

> Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs, 397 U.S. at 406,

and held:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the states in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, *Association of Data Processing v. Camp*, 397 U.S. 150; *Barlow v. Callins*, 397 U.S. 159.
> 397 U.S. at 420.

See also King v. Smith, 392 U.S. 309 (1968); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968); *Case v. Borak*, 377 U.S. 426, 432-33 (1964). *Cf. Office of Communications of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (D. C. Cir. 1966).

Similarly, the California procedures which were found by the district court to be in violation of the unemployment section of the Social Security Act are subject to judicial review. Like HEW, the Labor Department has no procedure whereby an unemployment claimant "may trigger

and participate" in a Departmental review of a state unemployment program. Unemployment compensation was intended to provide its beneficiaries—eligible unemployed workers—with a well-earned "contractural right," *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22. This action is the only way in which those beneficiaries can enforce their right to unemployment benefits "when due" 42 U.S.C. 503(a)(1). As this Court concluded in *Rosado:*

> [W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. . . . It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare [unemployment] field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. 397 U.S. at 422-23.

II. Due Process Requires an Opportunity to Be Heard Before the Suspension of Unemployment Benefits.

A. PROCEDURAL DUE PROCESS EXTENDS TO UNEMPLOYMENT RECIPIENTS.

Last term in *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970), this Court reiterated its holding in *Sherbert v. Verner,* 374 U.S. 398 (1963) that: "Relevant constitutional restraints apply . . . to disqualification for unemployment compensation."[19] The framework for considering procedural due process which this Court set forth in *Goldberg* applies equally well to the suspension of unemployment benefits:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to

19. "The interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Sherbert v. Verner,* 374 U.S. 398, 405 (1968).

which he may be "condemned to suffer grievous loss," . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. at 262-63. (citation ommitted).

B. SECTION 1335 CUTS OFF UNEMPLOYMENT COMPENSATION FROM RECIPIENTS WHO HAVE ACQUIRED A RIGHT TO BENEFITS AFTER A THOROUGH FACTUAL INVESTIGATION ON THE MERITS.

The unemployed workers before this Court have all been found eligible by the State for unemployment compensation and have begun receiving benefits. No Departmental redetermination precedes the suspension of their benefits. No matter how strong their case, their benefits are routinely cut off upon an employer's appeal of the Department's decision to a State referee. This occurs despite the fact that, as the court below found, the eligibility determination is the product of a thorough factual investigation in which all interested parties are afforded an opportunity to be heard.

To commence the determination process, the prospective claimant files three forms (1101, 1426, and 3893) in order to notify the Department of the basis of the claim. These forms include information concerning the claimant's last employer, the reason for his no longer working and his work experience (A. 135). The claimant's reasons for no longer working are entered on DE 1101, and copies of this form are mailed to the claimant's previous employer for verification (A. 136). Pursuant to Section 1327 of the California Unemployment Insurance Code, the employer is then required to submit, within 10 days, "any facts then known which may affect the claimant's eligibility for benefits." (A. 136).

In the meantime, the claimant is informed that he must serve a waiting period consisting of the first week of un-

employment, during which he receives no payments; he is instructed to return during the third week of his claim for a second, more complete interview to determine his eligibility. This time increment allows the Department to verify the earnings reported and receive information from the employer concerning the claimant's reasons for leaving work. The employer may respond in writing, by phone, or, if he so elects, in person in those cases he wishes to contest, accompanied by any witnesses he desires.[20] Professional employer representatives also are available to him.

Upon the claimant's return, the eligibility interviewer must conduct an Eligibility Benefit Rights Interview, at which time he speaks personally with the claimant. If the employer has raised an issue concerning eligibility, the claimant may be required to submit detailed information pertaining to his separation from employment. (A. 136). Departmental regulations (L.O.M. 1400.3) impose a duty on the eligibility interviewer "to seek *from any source* the facts required to make a prompt and proper determination of eligibility." (A. 117) (emphasis added). If employer statements do not resolve the relevant issues of fact, "the employer must be given an opportunity to provide additional information." (A. 136). All interested individuals must be allowed to "confirm, contradict, refute, or explain any [relevant] evidence." (A. 136). The interviewer is further required to contact "all logical sources of information" and all parties who are necessary to ascertain the circumstances surrounding the claimant's separation from employment. This includes "telephone contact." L.O.M. 1404.4 (A. 122). If additional information is required, the

20. It is no more difficult for an employer to appear personally at the eligibility determination than at the appellate hearing. In either case, he need only appear in those cases he wishes to contest.

regulations specify that the eligibility interviewer may postpone his decision for 10 additional days. "The eligibility interviewer must then consider the evidence presented by all sides" (A. 136), and make a written determination of eligibility, recording the facts obtained and the reasons for reaching his conclusion. *Calif. Unemp. Ins. Code* § 1328; L.O.M. 1404.4 (22) (A. 123).

When the determination is favorable to the claimant, he is given credit for serving the waiting period and immediately paid for the second week. Payments are made weekly thereafter, unless the employer appeals the Department's decision to a State referee, in which case payments are thenceforth suspended. *Calif. Unemp. Ins. Code* § 1335. Although the claimant receives no weekly benefits pending the appeal, a median period of seven weeks (A. 106, 134, 137, 139), he is nonetheless required to report for suitable work each week in order to maintain his eligibility status and thus collect weekly benefits, in the event that he should prevail on appeal. *Calif. Unemp. Ins. Code* § 1253. If the decision is affirmed, his benefits are paid retroactively in a lump sum.

It is ludicrous to assert that a recipient who has been ruled eligible, begun receiving benefits and had them suspended due to an employer's appeal is seeking "payment *before* his eligibility has been established." (Appellants' Brief at 19). As the district court found:

> There seems little question that [the eligibility determination] is the critical point in the California procedure. The Department itself proclaims that "[t]he determination is the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible. L.O.M. § 1400.1" [A. 116]. Payments begin upon this

> decision. . . . All parties have been heard, evidence has been collected and an adjudication made. (A. 137).[21]

The eligibility determination is, in practice, the principal juncture for weeding out ineligible claimants; of the 139,274 claimants ruled ineligible in 1969 for leaving their last employment under disqualifying conditions, only 2,990 (1%) were found ineligible by a State referee upon an employer's appeal. (J.S. App. C at 14).[22] The remainder were found ineligible at the initial eligibility determination.

Equally without reason is the contention that the employee has an "overwhelming advantage" at the eligibility determination. (Appellants' Brief at 16). Of the 667,993 formal eligibility determinations made by the Department in 1968, 266,066 claimants were ruled *ineligible* for unemployment insurance. (A. 105). As a former Department interviewer and social insurance analyst points out:

> The most common reasons for resentment [by claimants] are that the interviewer doesn't listen to the claimant's side of the story, that the interviewer is too ready to accept the employer's version as given in writing or over the telephone, and that the claimant is expected to sign a record of the interview written by the interviewer. I think all three charges have merit. At desk interviews with a claimant, interviewers tend to develop a prejudice on the basis of information in

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21. A recent California legislative study described the eligibility determination in the following manner:

> Since the former employer is notified of the reason given by the claimant for his being unemployed, there is an opportunity for the department to ascertain factual circumstances relative to any assertion of the claimant. If the former employer does not agree, he provides his version as to why the employment relationship was terminated. At this point, the department examines the evidence and makes a "determination"—a decision as to the reason why the claimant is no longer employed. If such reason is disqualifying, no benefits are paid during the ensuing period of employment. *Report to the California Legislature, Joint Interim Legislative Unemployment Insurance Committee* 20 (1969).

22. In 64 percent of the cases that were appealed by employers in 1969, Departmental eligibility determinations were upheld. J.S. App. C at 14.

> the documents before them and rarely have the time or the disposition to hear the claimant's version which is often rambling and dedicated to irrelevancies . . . . Documentary evidence appears to have a mesmeric effect upon interviewers. Harris, "Claimant Views of Unemployment Administration in California" *Unemployment Insurance Review, U. S. Dept. of Labor* 2, 4 (July, 1967).

Nor is it "misleading to characterize" an appeal filed by an employer under Section 1328 of the Unemployment Code as an "appeal." (Appellants' Brief at 11). The California statute itself defines it as an "appeal," *Calif. Unemp. Ins. Code* § 1328, and it squarely fits appellants' definition of an appeal:

> Generally, an appeal implies that at an earlier time both parties to a controversy have had a full opportunity to present their respective case and one party, displeased with the result, seeks to have a higher tribunal redress the purported errors of the lower court. (Appellants' Brief at 12).

As the district court found:

> The eligibility interviewer must, then, consider the evidence presented by all sides and make a "determination" or "determination ruling" as to eligibility . . . . At that point, all parties have been heard, evidence has been collected, and an adjudication made. (A. 136, 137).

The appeal in California, therefore, is clearly not "the employer's first chance to present his case" (Appellants' Brief at 12).[23] Appellate jurisdiction lies not in the Depart-

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23. This is not necessarily the procedure followed in other states. In those jurisdictions that adopted the procedures outlined in the Model Acts, the employer is not contacted until after the Department has initially determined that a claim is valid on its face. A short stay of benefits is then provided so that the employer can be heard. *See e.g., D.C. Code,* § 46-311(b). In 1969, in the District of Columbia, 58 percent of the initial determinations appealed by employers were reversed; during the same period in California, employers prevailed in only 36% of their appeals. *U.S. Department of Labor, Bureau of Manpower Administration, Unemployment Insurance Statistics,* Table 18 (March, 1970).

ment, but rather the California Unemployment Insurance Appeals Board, an independent appellate body. *Calif. Unemp. Ins. Code* § 401. Appeals are heard by State referees who are responsible only to the Appeals Board. *Calif. Unemp. Ins. Code* § 404.

In California, therefore, an initial determination of a claimant's eligibility confers a right to benefits upon that claimant. Under Section 1335, they may then be suspended no matter how strong the merits of his case. The routine suspension of benefits, pending an employer's appeal, arbitrarily deprives him of due process of law.

C. AN OPPORTUNITY TO BE HEARD BEFORE THE SUSPENSION OF BENEFITS IS CRITICAL TO THE VITAL INTERESTS OF UNEMPLOYMENT RECIPIENTS.

1. An opportunity to be heard has traditionally been required before governmental action becomes effective.

"A fundamental requirement of due process is the 'opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has long recognized that the opportunity to be heard required by due process may not be meaningful unless afforded prior to the taking of property:[24] As noted in *Southern Railway Co. v. Virginia*, 290 U.S. 190, 196 (1933):

> The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative office the appellant is entitled to a fair hearing upon the fundamental facts.

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24. This Court recognized in *Goldberg* that "much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property." *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8 (1970). Governmental interference with these interests likewise requires a meaningful opportunity to be heard. *See, e.g. Willner v. Comm. on Character and Fitness*, 373 U.S. 96 (1963); *Greene v. McElroy*, 360 U.S. 474 (1959). *See also,*

See also, Opp. Cotton Mills v. Administration, 312 U.S. 126, 152-153 (1941); *U.S. v. Illinois Central Railway Co.,* 291 U.S. 457, 463 (1934); *Londoner v. Denver,* 210 U.S. 373 (1910).

Twice within the last two terms, this Court has recognized that in situations involving serious personal need, only an opportunity to be heard *before* the taking of property affords meaningful process. In *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 342 (1969), the Court found unconstitutional a prejudgment garnishment procedure: "It needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." (citation omitted). The notion that a later hearing on the merits meets constitutional requirements was explicitly rejected: "But in the interim the wage earner is deprived of his enjoyment of earned wages." 395 U.S. at 339.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court held that procedural due process requires an opportunity to be heard *before* the termination of public assistance benefits. Again, post-termination evidentiary hearings were found constitutionally deficient.

2. The suspension of unemployment benefits from eligible workers causes irreparable economic injury.

The unemployment recipient before the Court stands in an economic position similar to that of the garnisheed

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Escalera v. New York City Housing Authority, 425 F. 2d 853 (2nd Cir., 1970) (eviction from public housing); *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir., 1961), *cert. denied,* 368 U.S. 930 (1961) (suspension from public education); *Doyle v. Finch,* No. SA 69-CA 321, ... F. Supp. ..... (W.D. Texas, 1970) (disability benefits); *Contra, Messer v. Finch,* 314 F. Supp. 511 (E.D. Ky. 1970.) *See generally,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 *Harv. L. Rev.* 1439 (1968). Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 *Yale L. J.* 1245, 1255 (1965); Reich, *The New Property,* 73 *Yale L. J.* 733 (1964).

wage-earner in *Sniadach* and the welfare recipient in *Goldberg*. Although eligible for subsistence benefits, he has been deprived of their use without an opportunity to be heard during the period in which they are most critically needed. Vindication in a proceeding that occurs weeks, or often months later is hardly likely to make him whole.

Under the Wisconsin pre-judgment garnishment statute overruled in *Sniadach*, a "subsistence allowance" was exempted from attachment—50 percent of salary up to $25 for single individuals and $40 for those with dependents. *Sniadach, supra* at 338, n. 1. Yet the Court found that "a pre-judgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." *Id.* at 341-342.

The eligible unemployment recipient whose benefits are cut off pending his employer's appeal is even less fortunate. Having lost his "subsistence allowance," *i.e.*, the unemployment benefits themselves, he may be left totally destitute. And since he has been determined by the Department to be *eligible* for unemployment benefits, he is, by definition, *involuntarily* unemployed. *Calif. Unemp. Ins. Code*, §§ 1253, 1257-59. Weeks may pass before he is able to find work, especially in a period of wide-spread unemployment.[25]

This Court has long recognized the critical role played by unemployment benefits in the life of an involuntarily unemployed worker:

> Unemployment compensation will meet the breakdown which takes place in the family of the individual worker who is unemployed, the cumulative effect of unemployment upon his health and upon the health of his family. The effect of vagrancy is obvious, so

25. The California unemployment rate was 7% in December, 1970. *See, Press Release HRD* E-U242, January 11, 1971, California Department of Human Resources Development.

is the effect upon the taxpayer. *Steward Machine Co. v. Davis,* 301 U.S. 548, 558 (1937).

See also, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1936). Thirty years later in *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967), a unanimous Court pointed out that an unemployed worker "risk[s] financial ruin" when left without unemployment funds for a lengthy period of time. In the words of Mr. Justice Black:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severence of *sustaining funds.* 389 U.S. at 239. (emphasis added).

In the course of outlining the plight of qualified welfare recipients left without benefits in *Goldberg,* the Court specifically referred back to the above passage in *Nash* discussing the dilemma faced by unemployment recipients:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. *Cf. Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967).
>
> 397 U.S. at 264.

Thus, in distinguishing the termination of welfare benefits from the great majority of other instances involving the suspension of governmental funds ("the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption" 397 U.S. at 264) on the basis of the "crucial factor" of need, the Court in *Goldberg* was well aware that similar need is present in the case of suspensions of unemployment benefits.

Although unemployment benefits provide greater security and dignity, they were designed to serve much the same purpose for involuntarily unemployed workers as public assistance serves for the blind, disabled, young and aged. *Supra* at 12-15. Each provides "substaining funds" *Nash,*

supra at 239, to a recipient "when otherwise he would have nothing to spend." *Statement of Frances Perkins, S. Hearings* at 119. Each had its inception in the 1935 Social Security Act. Just as unemployment benefits were enacted to sustain the involuntarily unemployed and their families, the AFDC program before the Court in *Goldberg* was intended to protect children without "employable" parents. The programs are complementary both in nature and design. *See King v. Smith,* 392 U.S. 309, 327-333 (1968).

A close examination of the unemployment compensation scheme reveals its "welfare" function. While financed under insurance principles, "the insurance technique is a means to the welfare end." Becker, "The Adequacy of Benefits in Unemployment Insurance," *In Aid of the Unemployed* 80 (1965). The insurance technique is employed because it assures administrative convenience to the State, gives dignity to the unemployed worker, and accumulates funds in prosperous times for use in periods of recession. Need is based upon class studies and "operates in terms of averages" *Id.* Thus a detailed inquiry into individual need in every case is not required. But the system is clearly designed to meet individual need. "If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established. . . ." *Id.* at 81.

A judgment as to average need is determinative of the amount of benefits an unemployed worker receives. Recognizing that low-income workers are highly unlikely to have funds set aside for sudden periods of unemployment, benefit formulae are weighted in their favor:

> A judgment as to need also partly explains the existence of a maximum benefit. . . . The higher paid worker receiv[es] a smaller proportion of his wages in bene-

> fits . . . [because] he is not in so great need as the lower-paid worker and is more able to help himself. *Id.*

Moreover, "a judgment as to need underlies the provision of uniform duration, minimum benefits, and—in twelve states—dependency allowances." *Id.*

Departmental statistics further reveal the desperate plight faced by *eligible* unemployment recipients whose benefits are wrongfully withheld. The median yearly earnings of California unemployment insurance claimants are $3,933. *Report No.* 416, No. 6, *Claimants Who Filed Valid New Claims October 1966—September 1967, California Department of Human Resources Development* 3 (April 1, 1970) [hereinafter "*Report No.* 416"].[26] The poverty level for a family of four has been officially recognized as $3,531 —a most conservative estimate. *Department of Commerce, Bureau of the Census, Current Population Reports, Series P-60 No.* 68 (1969).

Unemployment especially affects workers without liquid assets. A 1953 Department publication reveals:

> A large proportion of the claimants, however, have a subsequent period of compensated unemployment within a benefit year, so there is some reason to believe that many are attached to covered employment only marginally. *A Sourcebook on Unemployment Insurance In California, California Department of Unemployment* 69 (1953).

The same situation still prevails. Fifty percent of the men and thirty-six percent of the women who are found eligible for unemployment file more than one claim a year. *Report*

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26. Although the survey covered October, 1966 to September, 1967, it was not published until April 1, 1970 and is the latest report available. The figures are based on "base-period" earnings. The base-period is a consecutive twelve-month period. *See Calif. Unemp. Ins. Code* § 1276.

No. 416, at 3,23. Employees who experience more than one unemployment episode a year are unable to build up cash reserves for periods of sudden unemployment. Some 48 percent of all families earning $3,000-$6,000 per year have less than $200 in liquid assets. Katoma, "Private Pensions and Individual Savings," *Investigation for the U.S. Department of HEW, University of Michigan Survey Research Center* 63 (1965). *See also, U.S. Statistical Abstract, Table No.* 485 (1970).

For workers without liquid assets, unemployment benefits are critical to survival. A study based on over 5 million unemployment recipients points out that "the combination of all other types of nonwage income contributed *less* to the aggregate income of the unemployed than did unemployment insurance." Stein, "Special Labor Force Report: Work History, Attitudes of the Unemployed," 86 *Monthly Labor Review* 1405, 1411 (1963).

For those eligible workers whose unemployment benefits are suspended, basic necessities often have to be sacrificed. According to one survey, twenty-six percent of the households *receiving* unemployment benefits must resort to reductions in food expenditures, usually in the first weeks of unemployment. Klein, *Pennsylvania State University, Financial Adjustments to Unemployment, Occasional Paper 93, National Bureau of Economic Research* 35, 50 (1965). The percentage would be expected to be even higher among the recipients presently before the Court who, although found *eligible* for benefits, receive *no* funds for the lengthy period between the time their employer files an appeal and the time the decision is finally made. As in *Goldberg* then, "the termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Goldberg v. Kelly, supra* at 264.

Many unemployment recipients also find it necessary either to default on fixed obligations or to go into debt. "During the year in which unemployment occurred, more than one-fourth of the households borrowed money either from family funds or financial institutions" (Klein, at 3), usually in the first weeks of unemployment. *Id.* at 40. Again the percentage would be expected to be even greater for the *eligible* recipients before the Court who, under Section 1335, are left totally without benfiets.[27]

Moreover, welfare is often not a viable alternative for the eligible unemployment recipient whose benefits have been wrongfully suspended.[28] There are four categorical public assistance programs created by the Social Security Act and administered by the states: Old Age Assistance, Aid to the Disabled, Aid to the Blind, and Aid to Families with Dependent Children. *Cal. W & I Code*, §§ 11200, 12000, 12500 and 13500. Since a claimant would have to be blind, disabled or of retirement age to qualify for the first three categories, these can be disregarded almost entirely, as the claimant is by definition eligible for the labor market. *Calif. Unemp. Ins. Code* §§ 1253, 1257-59. In order to qualify for the fourth, the claimant must have minor children, which excludes all single wage earners or childless couples.[29] Furthermore, his family must have less than $600

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27. Mortgage foreclosures also present a significant problem to unemployed workers. *See Mortgage Foreclosure in Six Metropolitan Areas*, "The Relationship of Unemployment to Mortgage Foreclosures", 86 *Monthly Labor Review* 1421, 1422 (1963).

28. As the court below found, the "primary reason" states were required to pay benefits "when due" under 42 U.S.C. 503(a)(1) was to tide workers through temporary periods of unemployment *without having to resort to relief*. (A. 139) (emphasis added). *See H. R. Rep.* at 7; *supra* at 12-15.

29. In addition, in those states which do not have AFDC-Unemployed (AFDC-U) programs, 42 U.S.C. 606(b)(1), 607, unemployed workers with minor children and a spouse in the home are also not eligible for AFDC benefits.

in personal property.[30] Thus, even the recipient with a family who is eligible for welfare suffers irreparably: to receive benefits, he must divest himself of nearly all of his assets including, if it exceeds the welfare ceiling in value, the very car he needs to look for work.

Nor is general assistance ("county poor relief") a feasible alternative. In California, the counties are required by State law to provide for poor persons within their respective jurisdictions. *Cal. W & I Code* §§ 17000-01.[31] However, since general assistance is funded solely by local resources,[32] it is completely inadequate to provide even a bare subsistence level of benefits. The average payment to a family in California under the general assistance program in 1969 was $59.74 per month (less than $14.94 per week). *California Human Relations Agency, Public Welfare in California, Table* 29 (1969). The county averages varied from a high of $95.28 per month in San Francisco to $8.24 per month in Tulare County. Moreover, since counties have complete power to determine all conditions governing eligibility,[33]

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30. A welfare recipient is entitled to own a car worth up to $1500 if he uses it to seek work. *Cal. W & I Code* § 11255.

31. In many States, general assistance is not required but is totally a matter of county option.

32. Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 *U.C.L.A. L. Rev.* 787, 813 (1968).

The parochial nature of general assistance makes it a totally unreliable alternative to unemployment insurance:

> Persons ineligible under federally-aided programs may receive a limited or sporadic assistance in some parts of some States from State or locally financed general assistance programs. . . . [S]ome states provide no funds for general assistance; or . . . general assistance may be available in some parts of some States which have very low standards. *Advisory Council on Public Welfare, Having the Power, We Have the Duty* 25 (1966).

33. *County of Los Angeles v. Department of Social Welfare*, 41 Cal. 2d 455, 260 P.2d 41 (1955). *Advisory Council on Public Welfare, Having the Power, We Have the Duty* 25 (1966).

in some States able-bodied wage earners are specifically excluded from general assistance.

As one commentator notes:

> Since able-bodied men typically are omitted from coverage under categorical assistance, their needs must be met under general assistance, if at all. We know, however, that the unemployed or underemployed are ineligible for income maintenance in a number of jurisdictions. Hence, certain needy persons do not, under the present system, have access to public support. Rosenheim, *Vagrancy Concepts in Welfare Law,* 54 *Calif. L. Rev.* 511, 521 (1966).

Thus, an unemployed wage earner whose unemployment benefits have been suspended under Section 1335 is either excluded from most of the available welfare programs, or would suffer financial ruin if forced to rely on those open to him.[34] And, even if eligible, he would first be required to undergo a thorough eligibility investigation by the local welfare agency, which may not be completed for a number of weeks. In California:

> The determination of eligibility shall be completed . . . within not more than 30 calendar days. . . . [T]he specified time limit may be exceeded where completion of the determination of eligibility is delayed because of circumstances beyond the reasonable control of the agency. *State Dept. of Social Welfare, Public Social Services Manual, Reg.* 40-126.

As in *Goldberg* and in *Sniadach* then, the "crucial factor" of need pervades this case. Unemployment benefits are *"sustaining funds." Nash, supra* at 239. A suspension of

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34. Although welfare was potentially available to the aggrieved garnishee in *Sniadach,* the Court properly recognized that "as a practical matter," a prejudgment garnishment may "drive a wage earning family to the wall." *Sniadach v. Family Finance Co.,* 395 U.S. at 341-42.

unemployment benefits to *eligible workers* is unlikely to pass without leaving in its wake irreparable economic injury.

3. A prior hearing is indispensable in order to counteract the inherently arbitrary nature of the California suspension procedure.

An opportunity to be heard before benefits are suspended is in many respects even more appropriate in this case than in *Goldberg*. Unlike the welfare recipient in *Goldberg* who was initially found eligible for benefits but subsequently redetermined ineligible, the unemployment recipient before this Court has been found *eligible* for benefits in the last determination made by the relevant state agency. His weekly benefits have been interrupted, not by a neutral Departmental redetermination as in *Goldberg*, but instead, upon an appeal by an *adverse* third party, his former employer.[35] This procedure bears remarkable similarity to the process found unconstitutional in *Sniadach*. There an action by an adverse third party—the filing of a garnishment action—could "freeze" critically needed wages. In both cases, the aggrieved party is arbitrarily deprived of critical funds without consideration of the merits of his case.[36] Thus,

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35. An employer has an economic incentive to appeal an eligibility determination in his former employee's favor: to protect his reserve account. Indeed he has no reason not to appeal. *See, infra* at 52; *supra*, n. 11 at 20.

36. For a discussion concerning the tendency of certain employers to file unmeritorious appeals, see *Opinion of the Chairman, Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature* 82 (1945). The inherent arbitrariness of the California procedure is especially apparent in the case of a late appeal by an employer. As noted in n. 12, *supra* at ....., while good cause must be shown for a late appeal, *Calif. Unemp. Ins. Code* § 1328, benefits are, nonetheless, cut off immediately upon such an appeal, with the question of cause left for the appellate hearing many weeks later. If good cause is not found, the appeal is dismissed. Thus, even when an employer's appeal never reaches the merits, *eligible* unemployed workers are denied benefits for a median period of seven weeks. (A. 106).

under Section 1335, an *eligible* employee's benefits may cease to flow for a median period of seven weeks regardless of the strength of his claim, (A. 106).

Sixty-four percent of the appeals filed by employers in 1969 were decided in favor of their employees[37]—double the percentage of appeals ultimately won by welfare receipients in *Goldberg*. See *Kelly v. Wyman*, 294 F. Supp. 893, 901, (S.D. N.Y., 1968, three-judge court).[38] Thus, in 1969, $1,661,400 was found by State referees to have been wrongfully withheld from eligible employees. (J.S. App. C at 16.) As in *Goldberg*, retroactive benefits are made available to these claimants in a lump sum. However, the glaring inadequacy of retroactive unemployment benefits was clearly recognized by this Court in *Nash*, when it said: "even the hope of a future award of back pay may mean little to a man . . . faced with the immediate severance of sustaining funds." *Nash v. Florida Industrial Commission, supra* at 239. If eligible unemployed workers were afforded an opportunity to be heard before their benefits were suspended, this sum would have been available to them in the form of weekly unemployment benefits to help alleviate the critical problems caused by sudden unemployment. The following statement made by the Court in *Goldberg* applies equally well to unemployment compensation:

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination

37. J.S. App. C at 14; of the two individual appellees, Mrs. Hudson's eligibility determination was affirmed and Mrs. Java's was reversed by a State referee.

38. In *Goldberg*, 36 percent of the welfare recipients terminated without a prior hearing were found on appeal to have been improperly terminated. The court found this to be a "startling statistic." *Kelly v. Wyman, supra* at 901. Ironically, in the instant case the percentages are reversed making a prior hearing even more critical. As the Fifth Circuit stated in another context: "We do not abdicate our judicial role to statistics. But when figures speak, we must listen." *Hall v. St. Helena Parish School Board*, 417 F. 2d 801, 809 (5th Cir., 1969).

> evidentiary hearings are *indispensable* to that end. 397 U.S. at 265. (emphasis added).

Moreover, if prior hearings are mandated, the number of recipients winning appeals filed by employers would undoubtedly increase:

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the . . . bureaucracy. *Id.* at 264.

Without unemployment benefits, an *eligible* unemployed worker may be seriously handicapped in defending an appeal, by his former employer. Funds are necessary for contracting and preparing witnesses, and possibly even in retaining counsel to represent him at the hearing, which, of course, both sides are entitled to. Presumably, his former employer has tax-deductible funds available for all of these purposes.

While it applied welfare redistributive principles to the unemployment situation and attacked many of the same problems as public assistance, Congress clearly saw a basic distinction between unemployment and welfare—unemployment insurance was considered a "contractual right." *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22; *Remarks of Representative Doughton,* 79 *Cong. Rec.* 5468 (1935). All of its recipients are wage-earners who have worked for the security it affords.[39]

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39. "Even though the employers in the first instance pay the contribution, . . . in the ultimate analysis it tends to rest upon the wage earner." *Statement of Alvin H. Hansen, Chairman of Subcommittee on Unemployment Insurance, Committee on Economic Security, S. Hearings* at 447; *See* Note, 73 *Yale L. J.* 357, 361 (1963); *Dialogue between Senator Black and Senator Wagner, S. Hearings* at 25; *Dialogue between Senator Black and Frances Perkins, S. Hearings* at 117-118; *Opinion of the Chairman, Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature* 82 (1945).

Unemployment benefits may not, therefore, be disbursed in an arbitrary manner.

In his concurring opinion in *Sniadach*, Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisites of procedural due process." *Sniadach v. Family Finance Co., supra* at 342. Since *Sniadach*, a prior hearing has been recognized as necessary to protect welfare recipients from arbitrary governmental action. *Goldberg v. Kelly, supra.* Unemployment compensation serves the same purposes for unemployed workers as public assistance serves for welfare recipients. Surely, due process provides the "working poor" with the same procedural safeguards.

B. THE INTERESTS OF THE STATE AND ITS EMPLOYERS DO NOT REQUIRE SUMMARY PROCESS.

1. The State's interests in suspending payment of unemployment benefits to eligible recipients pending appeal are much less substantial than those rejected as inadequate by the Court in Goldberg.

Only in "extraordinary situations" does summary procedure "meet the requirements of due process," *Sniadach v. Family Finance Corp., supra* at 339.[40] A brief review of the kinds of "extraordinary situations" in which due process has been held to permit summary procedures reveals that they bear no resemblance to the State's interest

40. In his concurring opinion in *Sniadach*, Mr. Justice Harlan used the phrase "[a]part from special situations" and "essential to protect a vital government interest." 395 U.S. at 343. The cases he listed as examples of such situations are markedly similar, and in two cases, identical to those cited by the Court as "extraordinary situations." *See e.g., Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950); *Fahey v. Mallonee*, 332 U.S. 245 (1947).

in this case: *Ewing v. Mytinger and Casselberry Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unfit food); *Yakus v. United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (access to military installation); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (management of loan association injuring public). No similar interests are presented by the State in this case.

The principal purpose of the suspension of benefits pending appeal is the prevention of possible overpayments in the event that a determination of eligibility is reversed. However, because of the thoroughness of the initial eligibility determination and the patent arbitrariness of Section 1335, 64 percent of the 8,315 employer appeals filed in 1969 were won by *employees*. (J.S. App. C at 14). Thus, of the $2,594,280 withheld by the State pending employer appeals, $1,661,400 was determined to have been wrongfully withheld from eligible employees. Consequently, if benefits had not been suspended from eligible employees pending employer appeals, overpayments would have amounted to only $932,880.

Appellants state:

> should the employer prevail on the appeal, the money that the claimant has received during the pendency of the appeal is essentially unrecoverable. (Appellants' Brief at 15-16.)

Yet appellants ignore their own statistics which reveal that only 36 percent of amounts paid to ineligible recipients is not recouped; *64 percent of all overpayments are recouped*

by the Department. (J.S. App. C at 16-17).[41] Thus, the possible annual cost to the State of affording justice to its

41. The Department's high rate of recoupment is not surprising. While welfare recipients "are likely to be judgment-proof," *Goldberg v. Kelly, supra* at 266, unemployment recipients are by definition "employable," *Calif. Unemp. Ins. Code* §§ 1253, 1257-59, and likely to have assets once reemployed. In its decisions in *Nash v. Florida Industrial Commission, supra* at 239, n. 4, and *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 365, n. 1, (1951), the Court made specific reference to the ability of states to recoup erroneous unemployment payments.

The State has been granted ample powers to recoup erroneous overpayments. Whenever it is determined that a claimant was at fault, either through willful action or by virtue of negligence, *including omission of a material fact,* the Department is empowered to assess the overpayment against the claimant and institute collection efforts. *Calif. Unemp. Ins. Code* §§ 1375-1380. It has authority to seek voluntary repayment, file a civil action to recover the overpayment, or offset the amount of the overpayment against any future unemployment benefits to which the claimant may become entitled under either the unemployment or disability insurance programs. *Calif. Unemp. Ins. Code* § 1379.

The ability to offset overpayments against future unemployment benefits is indeed a powerful club. About 50% of male claimants and 36% of female claimants file more than one claim in the same benefit year. *Report No.* 416 at 3,23. The Department, therefore, is a rather well secured creditor.

The State is also armed with criminal sanctions. *Calif. Unemp. Ins. Code* §§ 2101, § 2110, § 2113. These provisions make it a misdemeanor to willfully make a false statement or representation or knowingly fail to disclose a material fact to obtain any payment under the Act. By encouraging a claimant to make a full disclosure of all facts relating to his claim at the outset, they serve to minimize erroneous payments. Upon conviction and sentencing for offenses under *Calif. Unemp. Ins. Code* § 2101, the defendant may be ordered, as part of the terms of his probation, to make restitution to the Department in the amount of any overpayment resulting from his misrepresentation. *See also, Calif. Unemp. Ins. Code* § 2113. The effectiveness of these sanctions in discouraging misrepresentation by claimants at the eligibility determination is borne out by the record on appeal. In 64% of the appeals filed by employers, the Department's determination of eligibility is affirmed. J.S. App. C at 14.

In asserting that *Calif. Unemp. Ins. Code* § 1375 prohibits recoupment in the absence of fraud or misrepresentation by a claimant (Appellants' Brief at 16, n. 10), the State makes no reference

eligible unemployment recipients is not $18,000,000 (Appellants' Brief at 16), but rather $335,836. As $416,838,000

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to the decisions of the California Unemployment Insurance Appeals Board interpreting this statute. They reveal that the only requirement for recoupment is not willful fraud, but only a limited amount of "fault" on the part of the claimant.

In *In The Matter of Eveard A. Goding, California Unemployment Insurance Appeals Board, Precedent Benefit Decision No.* P. B-47 (1969), a discharged claimant received unemployment insurance while appealing his employer's right to dismiss him. He was subsequently reinstated in his job by a labor arbitrator and awarded back wages, less what he had already received in unemployment compensation. The Board expressly found that "the claimant in this matter was free from misrepresentation, willful non-disclosure or fraud" *Id.* at 7. However, he was required to repay his benefits because he received back wages for the same period. His "fault" (and that of his union) involved an erroneous interpretation of *Calif. Unemp. Ins. Code* § 1265, which permits an employee to receive supplemental unemployment compensation under a privately financed plan. With regard to the prohibition of recoupment where "equity and good conscience" would be offended, (*Calif. Unemp. Ins. Code* § 1375) the Board refused to waive Goding's overpayment despite the fact that his award for back wages was specifically reduced by the amount of unemployment benefits he received. With knowledge of the Act's requirements, he would have been able to obtain an award for full back wages. As it was, he lost both unemployment insurance and back pay. *See California Unemployment Insurance Appeals Board Benefit Decision No. 5960,* and *Miscellaneous Decision No.* 431.

Furthermore, a decision by an appeals referee in favor of an employer usually involves an automatic finding of fault on the part of an employee. Most employer appeals arise under Sections 1253, 1256 and 1257 of the California Unemployment Insurance Code. They require a claimant to be able and available for work, if offered; not to have left his last employer voluntarily without good cause; not to have been fired for misconduct; to make no misrepresentations to secure benefits; and to accept suitable employment, if offered. An adverse finding on any of these issues presupposes fault on the part of the claimant in obtaining benefits. Thus, with most overpayments, Section 1375 does not apply, leaving the State free to use its recoupment powers.

Clearly, the Department does not consider overpayments resulting from the decision in this case beyond its powers of recoupment.

was paid out by the State in benefits in 1969,[42] the continuance of weekly benefit payments pending employer appeals would have necessitated an increase in disbursements of only .08 percent. Moreover, since the California Unemployment Fund contained $1,304,868,000[43] at the close of 1969, it is clear that a loss of $335,836 in overpayments would have had a truly *de minimis* effect (.02%) on the solvency of the Fund.

Affording hearings to eligible recipients before their benefits are suspended can be expected to reduce this minimal amount even further. Assured the steady flow of unemployment benefits, many *eligible* recipients will be in a substantially better position to defend their eligibility determinations against an employer's appeal. A rise in the percentage of employees who successfully defend employer appeals consequently decreases the amount of overpayments pending appeal. Increasing an employee's ability to defend his eligibility insures the integrity of the appellate process and thereby furthers both the federal and State purpose in legislating unemployment compensation—*i.e.*, providing benefits to *all* eligible employees, thus "reduc-[ing] . . . the suffering caused [by involuntary unemployment] to a minimum." *Calif. Unemp. Ins. Code* § 100. *See Goldberg v. Kelly, supra* at 266.

Since July it has routinely notified all recipients receiving benefits pending an employer's appeal:

> An appeal has been filed from the local office, or referee, [sic] decision holding you eligible for unemployment insurance benefits. The Department will continue to pay these benefits to you, pending the result of the appeal. However, if the referee, or the Unemployment Insurance Appeals Board, finds that you are not eligible, you will have to repay these benefits to the Department. *State of California, Department of Human Resources Form* DE 6315 (adopted July, 1970).

42. *U.S. Department of Labor, Bureau of Manpower Administration, Unemployment Insurance Statistics, Table* 6 (March, 1970).

43. This figure represents an increase of $170,354,000 from the previous year. *Id.*

The payment of unemployment benefits pending an employer's appeal would tend to augment the Unemployment Fund in another respect. By providing an unemployed worker with funds with which to search for new employment, the Department would be contributing to a decrease in his period of unemployment—thereby decreasing the number of weeks in which it is necessary for him to receive unemployment benefits.

The State has additional means by which to minimize the possibility of overpayments. As the Court noted in *Goldberg:*

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. 397 U.S. at 266.

By increasing the number of appellate referees, the State could shorten the seven week median appeal period and eliminate the possibility of sizeable overpayments: the entire system then could operate more equitably. Since State administrative costs are reimbursed by the federal government and are not permitted to be drawn from the Unemployment Fund. (42 U.S.C. 503(a)(5), 1103(c)(1)), the hiring of additional referees would have no effect on the amount of money available for the payment of unemployment benefits.

The State suggests that if the appellees prevail, "frivolous appeals" would result: "By appealing, the employee would be able to stretch out his benefits." (Appellants' Brief at 17, n. 13). The point is totally without merit. Unlike the situation in *Goldberg,* all appeals under Section 1335 are filed by *employers;* the recipients whose benefits are suspended without a prior hearing have been found *eligible* by the State.

Finally, suspending benefits to eligible employees pending employer appeals is not necessary to encourage employers to "police" the system by challenging initial eligibility determinations. Inasmuch as 64 percent of the appeals filed by employers are unsuccessful, it is apparent that such appeals are not critical to the system's integrity. Moreover, the suspension of benefits pending an employer's appeal has no relationship to his incentive to appeal. Employers are concerned, and rightfully so, with protecting their reserve accounts which are debited when their employees qualify for unemployment benefits. But under Section 1335, if an employer succeeds in reversing an eligibility determination at any appellate level, his reserve account is immediately credited with all monies paid to his employee. Affording employees an opportunity to be heard before suspending their benefits, therefore, would in no way decrease an employer's incentive to challenge eligibility determinations that, in his opinion, have been incorrectly decided.

In *Goldberg*, where prior hearings presented the State with fiscal and administrative problems of a much greater magnitude, the Court stated:

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. 397 U.S. at 266.

Likewise, in this case, no "extraordinary" or "special" situation justifies denying unemployed workers an opportunity to be heard before their benefits are cut off.

2. The payment of unemployment benefits to eligible employees pending an employer's appeal would not adversely affect the legitimate interests of the State's employers.

In order to distinguish this case from *Goldberg*, the State suggests that "the central issue here is whether the em-

ployer's right to be heard before his property is taken" is outweighed by the prejudice to a suspended claimant pending appeal. (Appellants' Brief, 11)

In the words of Mr. Justice Frankfurter, "This is a horse soon curried." *Olberding v. Illinois Central R. Co.*, 346 U.S. 338, 340 (1953). No such dilemma confronts the Court. The amount of taxes contributed by each employer to the Unemployment Fund varies directly with the number of his former employees who qualify for unemployment benefits. But under the California scheme, an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is *not* charged with any benefits paid to his former employee pending his appeal. *Calif. Unemp. Ins. Code* §§ 1335, 1380. He has *no* responsibility for recoupment. Thus, regardless of whether benefits to his former employees are suspended pending his appeal, an employer is assured of a complete opportunity to be heard *before* effective action is taken against him.

Indeed, providing eligible recipients an opportunity to be heard before the suspension of benefits, would serve only to make the appellate process fair to both sides; employers would be caused no harm and employees would have an opportunity to be heard before their benefits are suspended.

The interest of the State's employers in preserving the solvency of the Unemployment Fund[44] does not justify

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44. Any unrecouped overpayments resulting from payments of benefits made to employees whose eligibility determinations are reversed upon appeal are made from a Balancing Account for which all employers in the State are equally liable. It must be noted, however, that while unemployment funds are collected from employers, the burden is borne indirectly by both employees and consumers. *See* n. 39, *supra* at 44.

depriving *eligible* recipients of critically needed benefits by an *ex parte* process. Their interest in the Fund is no different from the interest of any other taxpayer group which is composed of less than the general public and is concerned about the use of its tax contributions. As this Court stated in *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951):

> Payments of unemployment compensation were not made to the employees by respondent [his former employer] but by the State out of State funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent but to carry out a policy of social betterment for the benefit of the entire State.

Homeowners paying property taxes are not entitled to contest every school or sanitation expenditure in an evidentiary hearing. Nor are those charged with a motor vehicle tax entitled to a separate evidentiary hearing for every expenditure regarding highways. Likewise the State is not required to grant employers as a class a *Goldberg*-type evidentiary hearing whenever an individual employee receives unemployment benefits.[45]

Whatever interest the State's employers may have regarding the prevention of unrecouped overpayments in order to avoid the possibility of a future tax increase is adequately protected by the initial eligibility determination. As Mr. Justice Harlan stated in his concurring opinion in *Sniadach v. Family Finance Co.*:

> [D]ue process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the

45. Since every employer has an equal interest in the Balancing Account, the State's position would require that any employer in the State be permitted to appeal the eligibility determination of any unemployed worker.

> validity, *or at least the probable validity,* of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. 395 U.S. at 343 (Harlan J. concurring) (emphasis added).

Considering the wholly speculative nature of the employers' interest in avoiding future taxes, the opportunity to be heard provided an individual employer at the initial eligibility determination fully meets due process criteria.[46]

Inasmuch as the Unemployment Fund contained $1,304,868,000 at the end of 1969,[47] a possible loss of $335,836 (.02%) due to overpayments pending employer appeals is hardly likely to affect the State's 300,000 employers. On the contrary, although the injunction issued by the court below has been in effect since May 24, 1970, the Department reported in September, 1970 that the Fund has never been healthier. In an article in its *Newsletter,* headlined "Low Tax Rate Seen For 1971," the *Department* reveals that the balancing account tax—i.e., the general fund, not

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46. In *Gange Lumber Co. v. Rowley,* 326 U.S. 295 (1945), this Court held that an employer's interest in protecting against a possible tax increase was not a litigable interest. *Accord, Aero Design & Engineering Co. v. Oklahoma Employment Security Commission,* 151 F.Supp. 844 (W. D. Oklahoma, 1956, three-judge court), *aff'd,* 353 U.S. 943 (1957). *See also: Western Hardwood Lumber Co. v. California Employment Commission,* 58 C. A. 2d 403, 137 P. 2d 76 (1943). As one authority notes, comparative studies indicate that employers are much more likely to file appeals in States with experience ratings (i.e., the employer's tax rate is based on the number of his former employees found eligible for benefits) than in States in which all employers pay under an equal tax rate. *Becker, The Problem of Abuse in Unemployment Benefits* 334 (1953). Since employers have shown marked disinterest in filing appeals solely to protect against a future tax increase, this interest cannot possibly serve to justify cutting off an eligible employee's benefits by summary process.

47. *U. S. Department of Labor, Bureau of Manpower Administration, Unemployment Insurance Statistics, Table* 6 (March, 1970).

attributable to any single employer, which would be responsible for any unrecouped overpayments resulting from payment of benefits to eligible employees pending appeal—"will be *a new low* of .6 percent." *California Human Resources Department Newsletter,* September, 1970. (emphasis added).

Finally, as businessmen and citizens, employers also have an interest in assuring the payment of unemployment benefits to *eligible* employees at the earliest possible time.[48] Thus, the employers, as well as the State, have an interest in providing *eligible* employees with an opportunity to be heard before the suspension of their unemployment benefits.

CONCLUSION

The judgment below should be affirmed.

Dated: January 14, 1971

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48. Unemployment insurance was designed to protect purchasing power and stabilize the labor market—two distinctive employer concerns. *Supra* at 15-18.

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Supreme Court of the United States

OCTOBER TERM 1970

No. 507

CALIFORNIA DEPARTMENT OF
HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief in support of the position of the Appellees is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of one hundred and twenty-one national and international unions having a total membership of approximately thirteen and one-half million working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

Unemployment compensation was designed to protect "industrial workers ordinarily employed," Report To The

President Of The Committee On Economic Security, 13 (1935). That, of course, is an accurate description of the great majority of the members of the Federation's affiliates. The fact that the instant case promises to have a substantial impact on the manner in which unemployment compensation is administered, is, therefore, more than sufficient cause for the AFL-CIO to be vitally concerned as to its outcome. But in this instance the practical importance of the question presented does not exhaust organized labor's interest in the proceeding. For § 1335 of the California Unemployment Insurance Code, the provision overturned by the court below (A. 133–140), is not based on a valid neutral principle—it is based on the principle that the entire costs of litigation delay incident to an appeal of an initial eligibility determination shall be borne by the unemployed. Thus, § 1335 discriminates against workers, as a class, and in favor of employers, as a class, without any rational basis, thereby distorting the basic protective purposes of the unemployment compensation law. This being so, we have sought this opportunity to present the Court with an expression of our views.

ARGUMENT

Litigation is a method for determining whether the *status quo ante* shall be changed. The impetus for a judicial or administrative proceeding is the plaintiff's demand that the defendant change his course of conduct by taking certain specific actions and the defendant's refusal so to do. As California properly emphasizes (Cal. Br. 6–7), such determinations take time, often in considerable amounts. Delay is thus an inherent cost of this method of dispute settlement. Who shall bear that cost is, therefore, of critical significance. The legal rules which govern that determination are those which set the terms upon which interim relief pending a final decision on the merits is available. Initially, the costs of delay are on the moving party. The preliminary injunction shifts those costs to the defendant. Moreover, in a system providing for appeals the costs of delay are on the appellant. A stay shifts those costs to the appellee. Because of its cost-shifting function, interim relief is often more important in practical terms than the final determina-

tion on the merits, cf., *Liner* v. *Jafco*, 375 U.S. 301, 307–308 (1964).

The instant case tests the validity of the procedure California has adopted to allocate the costs of delay incident to an employer appeal from an initial determination, made "after all parties have been heard" (A. 137), that a former employee is eligible for unemployment compensation. Section 1335 of the California Unemployment Compensation Code provides that once such an appeal is filed no benefits shall be paid pending the appellate decision; in other words § 1335 provides for an automatic stay of the initial determination. The court below held that this stay provision is in conflict with both § 503(a)(1) of the Social Security Act, 42 U.S.C 503(a)(1), which requires state unemployment compensation systems to be administered in a manner "reasonably calculated to insure full payment . . . when due," and the Due Process Clause (A. 138–140).

The procedural setting of § 1335 is succinctly stated in the lower court's decision (A. 133–137):

> "A claimant for unemployment insurance benefits must initially file Forms DE 1101, 1426 and 3893. These forms, taken together, apprise the eligibility interviewer of the basis of the claim, the name of the claimant's previous employer, the reason for his no longer working, his work experience, and so on. The question most frequently basic to disputed cases, i.e. the claimant's reasons for no longer working, is answered on DE 1101 and copies of this form are immediately sent to the previous employer for verification. The employer is then bound to submit, within ten days, 'any facts then known which may affect the claimant's eligibility for benefits.' Calif. Unempl. Ins. Cde. § 1327. If the employer raises an issue as to eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job . . . The interviewer has, according to the Local Office Manual used in California, the duty 'to seek from any source the facts required to make a prompt and proper determination of eligibility.' The actual decision may be suspended an additional ten days to get further information. If employer statements leave certain questions unresolved, the employer

'must be given an opportunity to provide additional information.' L.O.M. §§ 1400.3; 1400.5 . . . Interested persons must be allowed to 'confirm, contradict, refute, or explain any evidence [which is relevant].' L.O.M. § 1404.4.

"The eligibility interviewer must, then, consider the evidence presented by all sides and make a 'determination' or 'determination ruling' as to eligibility. 'The determination is the point at which any issue affecting claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible.' L.O.M. § 1400.1. Payments begin upon this decision . . . The appeal Form DE 1000, upon being filed [however] halts payments . . . generally after two payments have been made . . . [N]o hearing is held; no chance is given the claimant to rebut, even in writing, new information offered by the appellant . . . [T]he arrest of payments continues for a median period of seven weeks."

In contrast, there is no provision in the California law for interim relief in those cases in which the initial determination is adverse to a claimant. And the context would appear to preclude such a provision. For a mere rejected claim of entitlement does not seem a sufficient basis for the payment of funds which are reserved by law for a delimited group. The result of § 1335 is, therefore, that on an appeal from an initial determination, when a claimant is the appellant, appellants bear the costs of delay; yet when a claimant is an appellee, appellees bear these costs. Thus, the purported "balance" California has struck (Cal. Br. 9–10) is not based on a neutral principle for distributing the costs of litigation delay—*it is based on the principle that in each instance the entire burden of those costs shall be borne by the unemployed.* This is contrary to the requirements of § 503(a)(1) and due process—as we shall now demonstrate.

1. *§ 1335 Cal. Unemp. Ins. Code Is In Conflict With § 503(a)(1) Of The Social Security Act.*

(a) The fundamental federal standard, cf., *Steward Machine* v. *Davis*, 301 U.S. 548, 594 (1937), that unemployment compensation shall be administered in a manner

"reasonably calculated to insure full payment . . . when due" prohibits an automatic stay of a determination favoring eligibility, rendered by the state after "all parties have been heard [and the relevant] evidence has been collected" (A. 137). There is no statement of the precise ambit of the limitation imposed by § 503(a)(1). As California notes (Cal. Br. 7) the legislative history is "scant" in the extreme. In light of the basic policies of the Social Security Act, however, it is quite clear that Congress's intent was to insure that there would be a prompt determination, after a hearing open to all parties in the event of a contest, which would establish the claimant's "contractual right," cf., Report To The President Of The Committee On Economic Security, 13 (1935), to benefits. At that point, a firm and rational basis having been supplied, compensation is "due" and full payment is required as a matter of right. In terms of the reasoning suggested in the introduction, pp. 2-4 *supra*, § 503(a)(1) provides that the costs of litigation delay incident to a prompt initial hearing, open to all parties, shall be borne by claimants; but that after that hearing the costs of further delays shall fall on appellants, without regard to whether they are employers or claimants, and may not be imposed upon the unemployed in all cases.

(b) Unemployment compensation is designed to provide the displaced "industrial worker ordinarily employed," Committee On Economic Security Report at 13, with economic "security during the period following unemployment," in order to "maintain purchasing power at times when most needed" and to "encourage the regularization of employment," S. Rep. No. 628, 74th Cong., 1st Sess., 12, 16 (1935). Prompt provision of economic security is the keystone of the plan. Maintenance of consumer purchasing power to arrest a downward economic spiral, and encouragement of the pursuit of job opportunities to stabilize the labor market is dependent upon the payment of benefits at the earliest practicable moment after claims are made, and not after a substantial period of time has elapsed. For Congress's premise was that the benefits paid were not to provide a comfortable superfluity, but to "enable workers

who lose their jobs to tide themselves over . . . without having to resort to relief," H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). As this Court noted in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967) the unemployed are "of modest means," have "heavy responsibilities," and risk "financial ruin" if there is a "severance of [the] sustaining funds" provided by compensation.

Despite the soothing assurances offered by California (Cal. Br. 14–15, 17, 22–24), and the *amici* supporting its position, e.g., Southern California Edison Co. *Amicus* Brief at 11-14, the available statistical evidence demonstrates that today, as in 1935, prompt payment of compensation is required to assure economic security to the average "industrial worker ordinarily employed," Committee On Economic Security Report at 13. The mean hourly wage of the rank and file worker as of November 1970 was $3.29 an hour, i.e. approximately $6,500 to $7,000 a year, U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Vol. 17, No. 6, p. 74, Table C-2 (Dec. 1970). Typically, that worker is the sole support of a family of four.[1] The latest government estimate places a "lower" weekly budget to feed, shelter, clothe and provide medical care for such a family at $90 a week, U.S. Dept. of Labor, Bureau of Labor Statistics, *Spring 1970 Cost Estimates For Urban Family Budgets*, Table 1 (Dec. 21, 1970). But the median liquid assets of that family, available to meet an emergency which cuts off the flow of income, is $260, Katona, et al., Survey of Consumer Finances p. 100, Table 6-3 (1970). Thus, the typical industrial worker has funds to tide him over for only three weeks of unemployment.

The policy favoring prompt payment does not stand alone. Unemployment compensation does not provide "social insurance," see, Note, *Charity Versus Social Insurance In Unemployment Compensation Laws*, 73 Yale

[1] There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. Statistical Abstract of the United States 1970, p. 35, Table 40. In over 55% of families only one spouse is an income earner, U.S. Dept. of Commerce, Bureau of The Census, *Current Population Reports*, Series P-60, No. 75, p. 55, Table 24 (Dec. 14, 1970).

L.J. 357 (1963) for every citizen nor does it cover all risks of those whom it does protect. To be eligible the claimant must have sufficient earnings in the base period to demonstrate an attachment to the labor market, see, § 1275 Cal. Unemp. Ins. Code, and his unemployment must be involuntary, see, *id.* at § 1240. Moreover, California, in common with most states, has an experience rating system which provides that an employer's tax payments to the Fund shall vary with the number of his former employees who qualify for benefits, see, *id.* at §§ 977, 978. These two features of the unemployment compensation system require procedures for determining eligibility at which the claimant's former employer may be heard. This is necessary to carry out the intent of the law, to insure that the fund is not depleted by improper payments, and secondarily to safeguard the limited interest of former employers.

Section 503(a)(1) of the Social Security Act resolves these competing considerations by mandating prompt determinations of eligibility, after all parties are heard, which establish the claimant's contractual right to benefits, thereby making full payment to him "due." The California experience makes it plain that this resolution of the relevant interests provides the optimum solution to the problem presented.

As the court below recognized, the California law provides for an initial determination, within 21 days of the filing of a claim (A. 128-131), after "all parties have been heard [and the relevant] evidence has been collected" (A. 136–137). This procedure is effective in insuring that benefits are limited to eligible claimants. In 1969 there were 395,740 initial determinations in favor of claimants. During the same period 113,395 initial claims were disallowed because of insufficient base period wages, and 139,274 claims were disallowed because the claimants had left their last employment under disqualifying conditions. Employers appealed 8,315 of the favorable determinations, and 5,325 of these appeals, 64% of the total, resulted in *affirmance* of the finding of eligibility. Appellant's Jurisdictional Statement, App. C. p. 14. Thus, the overwhelm-

ing preponderance of ineligible claimants, 98.2% of the total, are screened out at the initial determination stage. The system is not dependent on further hearings to limit the payment of benefits to those who are eligible.

The record also demonstrates that stays pending employer appeals are not necessary to safeguard against depletion of the Fund. In 1969 abolition of the stay procedure would have resulted in payments of approximately $950,000 to claimants later held ineligible, Juris. State., App. C, at 14–15.[2] The loss to the Fund would have been on the order of $350,000, however, for California states that in the period 1965 to 1969 it recovered 64% of "benefits paid to claimants not eligible," *ibid.* In 1969 California collected $587,122,000 in unemployment taxes and interest. And the Fund's reserves stood at $1,304,868,000, which represented a one year increase of $170,354,000. U.S. Dept. of Labor, Bureau of Manpower Administration, *Unemployment Insurance Statistics,* Table 6 (March 1970). Abolition of the stay requirement would, therefore, result in a loss equal to .06% of income, .03% of reserves, and .2% of one year's increase in the reserve. Thus the Fund's solvency is assured. And the spectre of a tax increase if the decision below is affirmed is wholly illusory.

Finally, it is plain that § 1335's stay provision is not necessary to insure former employers an adequate opportunity to protect their experience ratings. California law allows such employers a full opportunity to be heard prior to the initial determination (A. 135–137). Moreover § 1335(b) provides:

> "If [a] determination [in favor of a claimant] is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

Thus elimination of the stay procedure does not even touch, much less harm, the limited financial interest of former employers. And, of course, § 1335(b) by itself insures that such employers will continue to have a sufficient

[2] There were 2,990 successful employer appeals, the average benefit paid was $52 a week, and the median time for an appeal was 6 weeks.

economic interest to motivate them to appeal when there is a substantial allegation of error at the initial stage.

The foregoing demonstrates that a stay pending an employer appeal from a determination reached after full hearing does not significantly further sound administration of unemployment compensation. In contrast, such stays undermine, to a marked degree, the basic objectives of the law. The median time necessary to hear and decide an employer appeal in California is 6 to 7 weeks (A. 49; Juris. State. App. C. p. 15) and the median period of unemployment is 9 weeks (A. 139). Assuming a random distribution, approximately half of those found eligible on appeal will receive their benefits after they have regained employment. That result is directly contrary to Congress's desire to provide compensation "during the period following unemployment when the unemployed are seeking another job or waiting for a return to their old positions," S. Rep. No. 628 at 12. Moreover, the typical industrial worker has sufficient resources to make ends meet during the normal three-week period provided by California for an initial determination (A. 128-131). At that point, his resources are apt to be exhausted, see, p. 6 *supra*. Yet § 1335 requires him to wait a median period of one and a half additional months to secure the moneys which were intended to "tide [him] over [unemployment] . . . without having to resort to relief," H.R. Rep. No. 615 at 7. Obviously, this thwarts the inherent "protection afforded by social insurance [which] comes to the worker as a matter of right," 79 Cong. Rec. 5468 (1935; Remarks of Rep. Doughton, Chairman of the Committee on Ways and Means).

Indeed, it is difficult to conceive of a provision more inconsistent than § 1335 with the social insurance philosophy which informs unemployment compensation. The essence of social insurance is that payments are due under "clearly defined conditions" stated in "such a way that the worker can determine his benefit beforehand," Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 2 (1945). Its antithesis is a system which subjects a worker's entitlement to his former employer's arbitrary

veto power. And § 1335 does give employers precisely that veto power. It allows for no distinctions. An appeal automatically stays the payment of benefits, even if frivolous and filed with the specific intent to harass.

The foregoing makes it plain that placing the entire costs of delay incident to appeals of initial determinations on claimants would be unjustified in any event. And that practice is manifestly intolerable in a system in which 64% of employer appeals are decided in favor of claimants.

(c) The basic argument presented to justify § 1335 (Cal. Br. 7–8) is that it is in conformity with the model statutes drafted by Edwin Witte, Executive Director of the Committee on Economic Security, see, Witte, The Development Of The Social Security Act, 125-126 n. 78 (1963); Hearing On S. 1130, 74th Cong., 1st Sess., 602, 623 (1935), and the District of Columbia Unemployment Compensation Law, § 46–311 D. C. Code. The model statutes and the D. C. law do provide for stays pending an employer "appeal" from an initial determination. However, it is quite clear that it was the contemplation of those bills that the initial determination would be based solely on the claimant's information, and that the "appeal" would be the employer's first opportunity to be heard. For that is the manner in which the D. C. law is administered, *D. C. Compensation Board* v. *Hahn*, 399 F.2d 987, 989–990 (C.A. D.C., 1968). Thus, these statutes are consistent with the position developed herein, rather than with § 1335. The question of whether there shall be a stay pending a full hearing is entirely distinct from the question of whether stays shall be permitted after such a hearing. For a full hearing alters the calculus of the relevant interests. Thus our contention is simply that full payment is "due" upon a prompt determination in favor of the claimant rendered after all parties have been heard. Section 503(a)(1) makes no distinction between procedures, such as California's in which the hearing occurs at the earliest stage, and procedures, such as D. C.'s, in which the initial determination is made solely on the claimant's information and in which the first hearing occurs on "appeal." The limitations it imposes are, as the model

statutes expressly state that "disputed [claims] shall be promptly decided," Hearings on S. 1130 at 623; and that after the initial hearing the costs of further litigation delay shall fall on appellants and may not be shifted to claimants.

The subsidiary arguments advanced by California are all contrary to the facts. First, the theme of California's brief is that it follows from the fact that there is no "means" test for unemployment compensation that claimants can easily weather the "delay . . . of modest duration" imposed by § 1335 (Cal. Br. 22–23, 14, 16). The logic of this position is faulty. The decision not to impose a "means" test does not lead to the conclusion that if there were such a test the majority of claimants would be denied benefits. The means test was omitted because of ethical considerations, not because it was believed that the intended beneficiaries were well-to-do. As Representative Doughton stated, the form of the bill was dictated by a belief that workers who had contributed to the creation of the wealth paid into the fund should not have their benefits marked with "the stigma of charity with its devastating effect on the morale of the population" 79 Cong. Rec. 5468. But Congress recognized that the typically displaced "industrial worker ordinarily employed" could not "tide himself over" a period of unemployment without compensation. That is the reason the law was passed, pp. 5-6 *supra*. And today as in 1935 the evidence indicates that the typical worker can not wait 6 to 7 weeks for his benefits without suffering substantial harm.

Second, it is contended (Cal. Br. 9–10) that employer appeals "cast a sufficient cloud on the initial determination to warrant withholding benefits." An employer's self-selection as an appellant is not a rational basis for concluding that an initial determination favoring eligibility was erroneous. That is clear from the fact that 64% of such decisions are affirmed, Juris. State. App. C at 15.

Third, California states (Cal. Br. 16) that payments to those later found ineligible are "essentially unrecoverable." The affidavit attached to its Jurisdictional Statement at

App. C, p. 15, however, states that from 1965 through 1969 64% of payments to ineligible claimants were recovered. And California Insurance Appeals Board, *In The Matter Of Everard A. Goding* (1969) (A. 90–92) demonstrates that the doubts expressed (Cal. Br. 16 n. 10) as to the availability of recoupment under § 1375 Cal. Unemp. Ins. Code are baseless.

Fourth, starting from the twin premises that payments to ineligible claimants are unrecoverable, and that the decision below requires that all "disqualified claimants should be paid benefits until given a referee hearing," Juris. State. App. C at 15, it is asserted (Cal. Br. 16) that elimination of the stay provision would require replenishment of the Fund by new levies upon employers. As just noted the first of these premises is unwarranted. It is equally clear that the second is also unsound. This case has nothing to do with the rights of disqualified claimants, see, p. 4 *supra*. It deals solely with the treatment, pending an employer appeal, of claimants who have been found *eligible* by the state, on the basis of a full hearing. Moreover, once this matter is put in proper context the data developed at p. 8 *supra*, belies the necessity of a tax increase. It demonstrates that the decision below does not threaten the soundness of the Fund to the slightest degree.

Fifth, it is argued (Cal. Br. 16–17, ns. 11, 12) that elimination of § 1335 would result in "the employer's property being taken away before he had had a meaningful opportunity to be heard." If this reference is to the interest of former employers in their experience ratings it is contrary to the record. The court below held that California law provides for "evidence [to be] presented by all sides" and for "all parties [to] have been heard" prior to an initial determination (A. 136–137). Moreover, § 1335(b) provides that an employer's reserve account shall not be charged for any payments to an ineligible claimant. If the reference is to the interest of all employers in procedures which minimize the basic tax rate, there are two short but complete answers. As a matter of fact elimination of the stay provision will not affect that interest, pp. — *supra*. As

a matter of law that interest is "too remote contingent and speculative" to warrant protection, *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305 (1945).

Finally, it is absolutely plain that the decision below would not "encourage frivolous appeal although the villain would be the employee, not the employer" (Cal. Br. 17 n. 13). The rule of law contended for here requires all appellants, without regard to whether they are employers or claimants, to bear the costs of delay. Claimants only appeal initial determinations finding them ineligible. In such cases, as we have noted, p. 4 *supra*, there is no requirement that benefits be paid pending the appellate decision. Thus, while § 1335 does encourage frivolous appeals by employers, the decision below discourages such appeals by both employers and claimants.

2. *§ 1335 Cal. Unemp. Ins. Code Is In Conflict With The Due Process Clause.*

The crucial process of granting or withholding interim relief is, of course, subject to the requirements of the Due Process Clause. That, indeed, is the premise of this Court's recent decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). *Sniadich* and *Goldberg* are seminal cases opening numerous legal perspectives. Their central concern, however, is with the limits the Constitution places on the choice of procedures utilized to shift the costs of litigation delay from one party to another.

In *Sniadach* the question was "whether the interim freezing of wages without a chance to be heard violates procedural due process," 395 U.S. at 340. This question was answered by the finding of a violation. The Court noted that prejudgment garnishment "may impose tremendous hardships on wage earners with families to support"; that the procedure "made possible . . . grave injustices"; that it created "enormous . . . leverage of the creditor on the wage earner"; and that the amount left the garnishee is "generally insufficient to support the debtor for any one week," 395 U.S. at 340–341. On this basis the conclusion was reached that:

> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 341–342.

In *Goldberg* the problem presented was whether welfare payments to a recipient who had been ruled eligible could be cut off prior to a hearing at which he could "appear personally, offer oral evidence, confront and cross-examine the witnesses against him. . . ." Thus the constitutional issue to be decided was "whether the Due Process Clause requires that a recipient be afforded an evidentiary hearing *before* the termination of benefits." 397 U.S. at 260 (this Court's emphasis). The holding of *Goldberg* is that "summary action pending a later hearing" is prohibited and that a pre-termination hearing is required:

> "It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.
>
> • • •
>
> "Moreover, important governmental interests are prompted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same

> opportunities that are available to others to participate meaningfully in the life of the community. . . . The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end. Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. . . .
>
> "We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. . . . Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." 397 U.S. at 263-266 (this Court's emphasis).

In analytical terms, then, both *Sniadach* and *Goldberg* deal with procedures which automatically, without providing for effective notice and hearing, shift the costs of normal litigation delay from the party who would ordinarily bear them to the other side. And the underlying theory of those cases is that such procedures do not meet the requirements of due process where they shift these costs to a party who is thereby "condemned to suffer grievious loss," *Goldberg*, 397 U.S. at 263, absent a clear showing of an "overriding governmental interest," *id.* at 266. For in that situation, at least, "the stakes are simply too high," *ibid*, to allow a departure from "the fundamental requisite of due process of law [which] is the opportunity to be heard . . . at a meaningful time and in a meaningful manner," 397 at 267.

An initial determination of eligibility, made after "all parties have been heard" (A. 137), establishes that unemployment compensation payments are "due", *ibid.*, see, pp. 4-10 *supra*. California's "actual practice . . . is to begin payments" at that point, *ibid.* These payments are a matter of "statutory entitlement" which it is "realistic . . . to regard as more like 'property' than a 'gratuity' ", *Goldberg*, 397 U.S. at 262 & n.8. They are a "contractual right", Committee On Economic Security Report at 13, to a portion of a fund comprised of wealth which the claimant's labor helped to create. Indeed the unemployed worker's share of the fund varies in proportion to the value of the services which he provided, §§ 1275, 1280-1281 Cal. Unemp. Ins. Code. Section 1335 operates to deprive a claimant of the enjoyment of this right. The stay pending an employer appeal which it authorizes, automatically, without provision for notice or hearing, overrides an unreversed determination by the state as to his entitlement. Thus § 1335, like a prejudgment garnishment or a summary termination of welfare benefits, is a form of interim relief which shifts the costs of litigation delay from the party who would ordinarily bear them, here the employer-appellant, to the other side, here the claimant-appellee.

In the instant case, as in *Sniadach* and *Goldberg*, the result of this interim relief is to condemn the party who must bear those costs "to suffer grievous loss," 397 U.S. at 263. The typical displaced "industrial worker ordinarily employed," Committee On Industrial Security Report at 15, who is denied unemployment compensation pursuant to § 1335 occupies a position somewhat worse than the garnisheed employee, and somewhat better than the welfare recipient whose benefits are summarily terminated. The garnisheed employee, in addition to his liquid assets, has a continuing income in the form of a "subsistence allowance" of $25 to $50 to a week, *Sniadach*, 395 U.S. at 338 n.1. The typical displaced industrial worker has median liquid assets of $260 but no continuing income, p. 6 *supra*. And the welfare recipient "lacks [all] independent resources", *Goldberg*, 397 U.S. at 264. But in terms of the applicable legal standard these are distinctions without a difference.

For here as in *Sniadach* the granting of interim relief "may impose tremendous hardship on wage earners with families to support," it "may as a practical matter drive a wage earning family to the wall" because the money available will "generally be insufficient to support [the unemployed worker] for any one week," 395 U.S. at 340, 341-342. Thus in the instant case no less than in *Goldberg* "termination of [benefits] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits," 397 U.S. at 264 (this Court's emphasis), see, pp. 5-6, 9 *supra*.

While the position of the garnisheed employee, the compensation claimant, and the welfare beneficiary are comparable, the governmental interests supporting interim relief here are even more attenuated than those advanced in *Sniadach* and *Goldberg*. The loss of prejudgment garnishments undoubtedly harms honest blameless creditors, as a class, in a very real way. And there can be no doubt that the loss of the power to summarily terminate welfare benefits creates a "drain on fiscal and administrative resources" *Goldberg*, 397 U.S. at 266, of some dimension. In contrast the deleterious effects of abolishing stays pending employer appeals are miniscule. The ability of former employers to protect their experience ratings is untouched. The interest of the state, and of employers generally in a sound fund financed at minimal tax rates is unimpaired. And here, in contrast to *Goldberg*, 397 U.S. at 266, the interest in assuring that only eligible claimants receive benefits is safeguarded by an effective power to recover erroneous payments as well as by the fact that former employers continue to have an economic incentive to appeal questionable determinations. Finally, affirmance of the decision below may actually serve to reduce administrative expenses by reducing the incentive for frivolous appeals. See pp. 7-9 *supra*.

The basic argument put forward by California (Cal. Br. 18-24), which has already been refuted in detail, is that the unemployed are insufficiently needy to fall within the *rationale of Goldberg*. A buttressing point for that contention, not yet dealt with, is that, if necessary, compensation

claimants can secure welfare while awaiting determination of an employer appeal. In the context of the statute California is obligated to administer that point is impermissible. "The most fundamental purpose of . . . unemployment compensation . . . 'is to *prevent* the burden of injured employees being charges upon society' " (A. 138, emphasis in the original). Congress regarded referral of the displaced "industrial worker ordinarily employed" to welfare as a "grievous loss" in and of itself, because of the resulting "devastating effect on . . . morale . . . and . . . self respect," 79 Cong. Rec. 5468. Moreover, California's premise is incorrect:

> "Welfare is not available to single employable males between ages 20 and 45 in most counties. Moreover, in order to qualify for welfare assistance, a claimant with a family must come wthin the requirements of one of the categorical aid programs, of which there are four: Old Age Assistance; Aid to the Disabled; Aid to the Blind; and Aid to Families with Dependent Children. *Cal. W & I Code* Section 11200; 11200; 12500; 13500. Since a claimant would have to be of retirement age, disabled, or blind to qualify for the first three, they can be disregarded. In order to qualify for the fourth, the claimant's family must have less than $600 in personal property. *Cal. W & I Code* Section 11255. The claimant with a family therefore, must divest himself of nearly all of his assets before he can be eligible for the receipt of welfare benefits." (A. 78-79).

Finally it is asserted (Cal. Br. 18-19) that "in *Goldberg* the question of basic eligibility was closed and the focus was on subsequent termination," that "the question of basic eligibility is still open" here, and that this distinguishes the instant case since it would be improper to hold "that a claimant is entitled to payment *before* his eligibility has been established" (emphasis in the original). This is a calculated misconstruction of the theory of this case. Nothing sought herein would require the states to make payments to a claimant who has not been found eligible. The sole result of the decision below is to insure that where a ruling on the merits, made after "all parties have been heard," is in favor of eligibility the claimant may not be deprived of the en-

titlement thus established by a process of automatic interim relief without provision for notice and hearing. And contrary to the implication of California's argument, *Sniadach* demonstrates that this basic measure of due process protection is applicable at the initial stages of litigation and is not limited to situations in which the appellate process has been exhausted.

The sum of the matter is that the standards developed in *Sniadach* and *Goldberg* demonstrate that a finding that § 1335 is unconstitutional follows *a fortiori* from those decisions.

CONCLUSION

For the above stated reasons the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

vs.

JUDITH JAVA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE INTERNATIONAL UNION, UAW AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THIS AMICUS CURIAE

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America—UAW,[1] pursuant to Rule 42(2) of the Rules of this Court, obtained consent from appellants and from appellees to the Union's filing of an *Amicus Curiae* Brief in Support

[1] The *Amicus Curiae*, International Union, UAW, will hereinafter usually be referred to as "UAW" or as the "Union".

of Appellees' position on the merits. This Consent is being filed with the Clerk of this Court along with this Brief.

The UAW has an interest in this case, both as an employer, which pays taxes into unemployment insurance funds, and as a representative of employees covered by unemployment insurance laws and by the Social Security Act.

The UAW is an employer or employing unit in thirty-four States. These include California and the following States: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin. In addition, the Union is an employer in the District of Columbia and Puerto Rico. Finally, Local Unions, which are affiliated with the UAW, are separate employers in most of said States.[2]

The Union is also a labor organization within the meaning the the National Labor Relations Act, as amended. As such, the UAW represents approximately 1,412,000 members in the United States, including about 54,000 members in California. Furthermore, the Union is the representative of numerous other employees who are not members of it. Agents of the Union frequently are authorized by its individual members and by others to present their claims for unemployment insurance to administrative agencies.

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[2] There are twenty-three UAW Local Unions in California, many of which are also "employers".

SUMMARY OF ARGUMENT

Section 1335 of the California Unemployment Insurance Code is contrary to the Social Security Act in that it is not "reasonably calculated to insure full payment of unemployment compensation when due" (Title 42 U.S.C.A. Sec. 503(a)(1)).

When "due" refers to the time when payments must be made to unemployed workers in order to fulfill the purposes of the Federal unemployment insurance program—that is when these persons are out of work and in greatest need of the money.

Because of the delays in the payment of unemployment insurance, which are inherent in the California procedure and in the procedures of some other states, unemployed workers do not receive full payment of their compensation until months and even years after they became unemployed. These delays are contrary to the general purposes of the California Unemployment Insurance Code and of Federal program, which Code and program were intended as emergency relief from temporary loss of employment and remuneration.

By suspending the payment of compensation to claimants, after an initial administrative determination of eligibility, appellants deprive appellees and other unemployed workers of property without due process of law.

This Court recognized the financial need of claimants for unemployment insurance in *Nash v. Florida Industrial Commis.*, 389 U.S. 235 (1967). The principles of *Goldberg v. Kelly*, 397 U.S. 254 (1970), *a fortiori* apply to claimants for unemployment insurance; this Court said that they did in *Goldberg*.

Appellants argument that the District Court should have avoided holding Section 1335 of the California Statute unconstitutional is not forceful or relevant. The Court held that Section 1335 was contrary to the purposes of the California Statute (A. 138, 139)[3] and was contrary to Federal Statutes and policy as well as to the United States Constitution. (A. 139). The Court stayed enforcement of a portion of said Section 1335. The District Court had no obligation to, as appellants now suggest,[4] draw a "guideline" for a proper administration of the Statute.

I.

THE CALIFORNIA PROCEDURES ARE CONTRARY TO THE EXPRESS PROVISIONS OF THE SOCIAL SECURITY ACT AND TO THE GENERAL PURPOSES OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE AND OF THE FEDERAL UNEMPLOYMENT INSURANCE PROGRAM.

The Union is in accord with and expressly adopts by reference appellees' pleadings and briefs to the District Court (A. 4-39 and A. 77-92), appellees' Interrogatories (A. 93-101) and the stipulation of the parties (A. 114-132). The Union will avoid repeating the matters in appellees' pleadings and briefs but will supplement said documents.

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[3] Pages of the Appendix will be cited in parenthesis, preceded by "A".

[4] Except for the general prayer that the District "Court grant such other relief as is proper in the premises" (A. 42), the Appendix does not reveal that appellants asked the District Court to draw any such guidelines.

A. The Employer Has An Opportunity to Be Heard Before a Determination of Claimant's Eligibility is Made.

Initially it should be noted that appellants mislead this Court as to the California procedures. Appellants imply that the administrative determination of a claimant's eligibility for compensation is made before the employer has had any opportunity to be heard (at pp. 11-14 of appellants' Brief). This is not true.

Prior to a determination of eligibility and the subsequent appeal under Section 1335 (with which this Court is concerned), the employer has an opportunity to present his evidence and views to the administrative agency. Section 1327 of the California Statute requires that the employer be notified of a claim and given 10 days to submit facts. The employer is not precluded from submitting such facts in person if desired. (See also Appendix, pp. 128-132).

Section 1328 stresses that "The facts submitted by an employer pursuant to Section 1327 shall be considered and a determination made as to the claimant's eligibility for benefits."

B. The Social Security Act Requires Payment of Benefits When Due.

The unemployment insurance program in California and other states was enacted pursuant to a Federal program set forth by Federal legislation. See, for example, Section 101 of the California Act which emphasizes that its program is part of said national plan.

Compare *Roxborough v. Unemployment Compensation Commission*, 309 Mich. 505, 511 (1944), where the Michigan Supreme Court said:

> ". . . it is clear the legislature intended that the governor's authority under section 35, to fix the salaries of members of the appeal board which were 'to be paid from the administration fund' created by section 10, *should be subject to the Federal social security board's regulation* of the expenditure of said administration fund, as provided in section 11. Therefore, *the governor's authority* to fix plaintiff's salary *was subject to such* regulation." (Emphasis supplied.)

The purpose of the National unemployment insurance program is to promptly pay benefits to unemployed workers. Accordingly it is even more important that this basic purpose not violate Federal regulations than secondary purposes, such as the payment of proper salaries to board members.

The procedure of appellant, California Department of Human Resources Development, is subject to Federal Social Security Regulations under Title 42, U.S.C.A. Section 503(a).

The importance of these regulations was stressed in *Smith v. District Un. Comp. Bd., et al.*, — F. 2d —, CCH Un. Ins. Reps. No. 466-21, Par. 21, 266 (D.C. Cir. No. 23, 448, Aug. 28, 1970):

> *"We need not turn to constitutional requirements.* We are after all dealing with a subject, *unemployment compensation, in which* the opportunity for hearing was considered by Congress to be so fundamental that *it was expressly mandated on the State agencies that they provide 'opportunity for a fair hearing,* before an impartial tribunal' for all indi-

viduals whose claims are denied. See 42 U.S.C. §503(a)(3)." (Emphasis supplied.)

See also *Crow, et al v. California Dept. of Human Resources, et al.*, — F. Supp. — (N.D. Calif. No. C-70 1126 ACW, Oct 12, 1970), where the Court, relying upon the District Court's decision in the instant case, said in part:

> "Unemlpoyment insurance, like public assistance, is administered by the individual States within a federal statutory framework. Both programs involve grants made to the States which have established programs of aid to unemployed and/or needy persons, which programs have been certified by relevant officials as meeting the standards set by federal statutes and regulations." (S.S. p. 4)

As appellees point out, the California Statute violates the Social Security Act because it is not "reasonably calculated to insure full payment of unemployment compensation when due" [Title 42, U.S.C.A., Sec. 503(a)(1)].

As discussed in more detail, *infra*, an unemployed worker is left with *no* funds and with the prospect of interminable litigation at the time the Social Security Act intended him and his family to be protected. The terrible effects of the combination of a suspension of unemployment benefits and the expenses of litigation were noted by this Court in *Nash v. Florida Industrial Commis.*, 389 U.S. 235 (1967). Mr. Justice Black, speaking for a unanimous Court, said in part:

> "Florida has applied its Unemployment Compensation Law so that an employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure *surrendering his right to unemployment*

compensation, and risk financial ruin if the litigation is protracted. Even the hope of a future award of back pay *may mean little to man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds.*"
(at 239; emphasis supplied)

The Court, in *Nash*, concluded in part:

"It appeals obvious to us that *this financial burden which Florida imposes will impede resort to the Act* and thwart congressional reliance on individual action. A national system for the implementation of this country's labor policies is not so dependent on state law. *Florida should not be permitted to defeat or handicap a valid national objective* by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. . . ."

"In *M'Culloch v. Maryland*, 4 Wheat 316, 436, 4 L ed 579, 609, decided in 1819, this Court declared *the States devoid of power 'to retard, impede, burden, or in any manner* control, *the operations of the constitutional laws enacted by Congress* to carry into execution the powers vested in the general government. . . .'" (at 239 and 240; emphasis supplied)

Similarly, the delay in paying compensation to eligible unemployed workers when they most need funds retards, impedes and burdens the operation of the Federally enacted State unemployment insurance program.

C. Section 1335 is Contarry To The General Purposes of the Federal Unemployment Insurance Program and of the California Unemployment Insurance Code.

The practice of appellant Department results in eligible unemployed workers being deprived of compensation when or shortly after they become unemployed and results in their families not having statutory funds at the time the workers and their families are most in need. This practice is directly contrary to the purposes of the Federal unemployment insurance program and of the California Statute itself.

Such practice cannot be justified by the contention that it preserves the Fund or that it protects the employers' ratings. The Department, as appellees indicate, has the power to later recover these payments from the employee. A similar argument was rejected in *Nash, supra,* where this Court noted:

> "*Respondents suggest that petitioner might enjoy a windfall if she was paid compensation* and was subsequently awarded back pay by the Labor Board. *This argument is unresponsive to the issue in dispute, however, since a State is free to recoup compensation payments made* during any period covered by a back-pay award. (Citations)". (Emphasis ours; at 239 of 389 U.S.)

The purpose of the California Act is stated in its Section 100 as follows:

> "As a guide to the interpretation and application of this division the public policy of this State is declared as follows:
>
> Experience has shown that a large number of the population of California do not enjoy permanent

employment by reason of which *their purchasing power is unstable.* This is *detrimental to the interests of the people* of California *as a whole.*

The benefit to all persons resulting from public and private enterprise is realized in the final consumption of goods and services. It is contrary to public policy to permit the supply of consumption goods and services at prices which do not provide against that harm to the population consequent upon periods of unemployment of those who contribute to the production and distribution of such goods and services.

Experience has shown that *private charity and local relief cannot alone prevent the effects of unemployment.* Experience has shown that if the State awaits the coming of excessive unemployment it can neither create immediately the organization necessary to orderly, economical and effective relief nor bear the financial burden of relief without disrupting its whole system of ordinary revenues and without jeopardizing its credit.

The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of *unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce* involuntary *unemployment and the suffering caused thereby to a minimum.*

It is the intent of the Legislature that unemployed persons claiming unemployment insurance benefits shall be required to make all reasonable effort to secure employment on their own behalf." (Emphasis supplied.)

The importance of prompt payment of compensation is emphasized in Section 1326 of the California Act and in Section 1400.1 of the regulations under said Act. (A. 116)

Compare Section 2 of the Michigan Employment Security Act (Mich. Comp. Laws, Sec. 421.1, *et seq*) which provides:

> "The legislature acting in the exercise of the policy power of the state declares that the public policy of the state is as follows:
>
> *Economic insecurity due to unemployment is a subject of general* interest and *concern which requires action by the legislature to* prevent its spread and *to lighten its burden which* so often *falls* with crushing force *upon the unemployed worker and his family,* to the detriment of the welfare of the people of this state. *Social security requires protection against this hazard* of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of *funds* during periods of employment *to provide benefits for periods of unemployment* by the setting aside of unemployment deserves *to be used for the benefit of persons unemployed* through no fault of their own, *thus maintaining purchasing power and limiting the serious social consequences of relief assistance,* is for the public good, and the general welfare of the people of this state." (Emphasis ours.)

Justice Benjamin Cardozo said, in *Charles C. Steward Machine Co. v. Davis,* 301 U.S. 548, 593 (1937):

> "An unemployed law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more."

Section 1335 of the California Act delays unemployment compensation to workers found eligible by the first admin-

istrative body. Such delays can be for months while employers and their counsel and the unemployed workers and what counsel they can afford litigate and relitigate their claims. Such practice deprives the unemployed workers of reasonable protection when they need it.

In *Administrator and Tomasula v. Republic Steel Corp. and Board of Review,* Ohio Ct. of App. 7th Dist., Mahoning County (No. 4268, 7 CCH Un. Ins. Reps. Para. 8303 (1963), Judge France, in concurring recognized that these delays defeat the purposes of the comparable Ohio Statute:

> "Already nearly three and one-half years have gone by from application time. Assuming probable motion to certify record to the Supreme Court in either this or the recent Stark County Court of Appeals decision, four years will have passed before the claimants will know whether or not they can get *money* which *was intended solely as emergency relief from temporary loss of employment.* This performance adds very litte lustre to either the administrative or judicial process. *So much time has passed that the original goal has been lost sight of* and the final result has lost all significance except as a matter for United Steel Workers and Republic Steel Corporation bargaining at some future conference table . I am convinced that *both administrative and judicial procedure should be such that the result, be it favorable or unfavorable, should be reached at a time when the individual worker can least relate it to his original economic loss." (Dictum;* at p. 38, 522; emphasis ours.)

It is significant that the instant case was brought by a legal aid society. Unemployed claimants without their compensation cannot feed their families let alone pay their lawyers. This fact that unemployed workers, with com-

penstaion suspended, have greater difficulty in affording prolonged litigation will discourage their reliance upon the Statute and, thus, further defeat the purposes of the California Act and of the Social Security Act. Compare *Nash v. Florida Industrial Commis.*, 389 U.S. 235, 239, 240, quoted, *supra*, at page 7.

The Brief of Southern California Edison Company, and others, as *Amicus Curiae*. argues that an unemployment compensation claimant "is much more likely to be able to get by for the short period of time required to resolve the issue of his eligibility . . ." But the purpose of the unemployment compensation program is to get funds to the unemployed worker at the time of his unemployment; this is precisely when the Edison Company suggest that he may "get by". Congress evidently believed that these unemployed workers could not "get by" at that time.

The State of Idaho makes a similar argument based on assertions (not in the record) that the average income of Idaho claimants was about $6,600.00. But these claimants, when they become unemployed, immediately go from this income to nothing. These unemployed claimants are unlikely to qualify for welfare payments when they first become unemployed. These unemployed claimants and their families may even be worse off than welfare recipients who presumably have become accustomed to surviving on very little. This situation cannot be answered by saying that the unemployed worker can always go on welfare. The unemployment insurance program was enacted to prevent that very thing.

The State of New York as *Amicus Curiae* admits that the "unemployment insurance programs throughout the country . . . contemplates a scheme of insurance to help workers over the hump of temporary unemployment." (at p. 2 of its Brief).

Paying compensation to an unemployed worker, after an initial determination of eligibility, accomplishes such purpose, even if the money is later recovered from him. Not paying compensation to such worker until months or years later defeats such purpose.

The State of Ohio expresses interest in a system where "the greatest number of unemployed persons can begin to receive benefits *immediately* upon request with (sic) the delay and expense occasioned by the necessity of a true adversary hearing". (at pp. 13, 14 of its *Amicus Curiae* Brief; emphasis ours) The instant case, of course, does not concern the procedure of paying compensation when there is no employer challenge. We are here concerned with the challenged cases. And these cases, as Ohio apparently admits, do result in "delay and expense." For an Ohio Judge's view of how absurdly its Unemployment Compensation Act works in contested cases,[5] see *Administrator and Tomasula v. Republic Steel Corp., et al.*, quoted *supra* at page 12. Ohio cites "three essential purposes which underlie the Federal Act." (at p. 15 of its Brief). All three purposes support appellee's position in the instant case.

The word "due" in Title 42, U.S.C.A. Section 503(a)(1), when construed according to said purposes of the unemployment insurance program, means the time when payments must be made to unemployed workers in order to stabilize their consumer demand, to provide compensation during their short time of unemployment and to prevent them from having to resort to welfare.

---

[5] The Ohio Statute's procedure is presently being challenged in the U.S. District Court for the Northern District of Ohio, Western Division No. C70-302 in *Foard v. Ohio Bureau of Unemployment Services.*

The definitions of "due" support such meaning. "Due" means when the payment is "Just; proper; regular; lawful . . . reasonable;" (Blacks Law Dictionary, 4th Ed. 1951, at p. 589) and "rightful . . . fitting . . . attributable, as to a cause . . ." (American College Dictionary, 1951 ed., at p. 372). The problem which must be met is the loss of a job and the *immediate* loss of remuneration. This problem can *only* be met by paying compensation when due—that is when the money is needed.

The words of the law, even if "clear and unambiguous" (as few words really are) are useful as guides or perhaps persuasive indications of the legislative purpose. In *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940), this Court said as follows:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results*, however, *this Court has looked beyond the words to the purpose of the Act.* Frequently, however, *even when the plain meaning did not produce absurd results but merely* an unreasonable *one 'plainly at variance with the policy of thee legislation as a whole' this Court has followed that purpose, rather than the literal words.* . . ." (At 543 and 544, emphasis supplied.)

One of the best analyses of how statutes should be interpreted and construed and applied, which we have found, is in *The Legal Process* by Professors Henry Hart and Albert Sacks. Professors Hart and Sacks discuss statutory construction at pages 1070 through 1343 of their 1957

Cambridge Tentative Edition. This discussion has been repeated in present still unpublished volumes of this work. The following conclusions are stated on page 1083:

> "The meaning of a statute is never plain unless it fits with some intelligible purpose. *Any judicial opinion * * * which finds a plain meaning in a statute without consideration of its purpose, condemns itself on its face.* The opinion is linguistically, philosophically, legally, and generally ignorant. It is deserving of nothing but contempt. * * *
>
> *"The first task in the interpretation of any statute* (or for any provision of a statute) *is to determine what purpose ought to be attributed to it.* The principal problem in the development of a workable technique of interpretation is the formulation of accepted and acceptable criteria for the attribution of purpose.
>
> "Deciding what purpose ought to be attributed to a statute is often difficult. But at least three things about it are always easy. (a) The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear. (b) *The* general *words of a statute ought never to be read as directing an irrational pattern of particular applications.* (c) *What constitutes an irrational pattern of particular applications ought always to be judged in the light of the overriding and organizing purpose."* (Emphasis the authors' and ours.)

The authors added:

> *"A formally enacted statement of purpose in a statute should be accepted by the court* if it appears to have been designed to serve as a guide to interpretation, is consistent with the words and context of the statute, and is relevant to the question of meaning at issue." (At 1339, emphasis supplied.)

The meaning of "due" suggested by appellants and the application of Section 1335 of the California Code lead to "absurd and futile results . . . [which are] plainly at variance with the policy of the legislation as a whole . . ." (*American Trucking Ass'n, supra.*) Almost all of those who support appellants agree that the purpose of the Federal unemployment compensation program and the programs of their particular States is to provide emergency relief from temporary loss of income due to unemployment. The District Court agreed in the instant case. Yet appellants ask this Court to hold that they may defeat said purposes by keeping compensation from out of work claimants who have been determined eligible through a fair administrative procedure.

Such a futile result, at variance with the purposes of such laws, is not necessary to protect the interests of the States or of employers. This Court should not be a party to such a result.

II.

SECTION 1335 OF THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE DEPRIVES WORKERS OF PROPERTY WITHOUT DUE PROCESS OF LAW BY SUSPENDING BENEFITS WITHOUT A PRIOR HEARING.

By suspending the payment of compensation to claimants, after an initial administrative determination of eligibility, appellants deprive appellees and other unemployed workers of property without due process of law.

Since at least *Goldberg v. Kelley*, 397 U.S. 254, 25 L Ed 2d 287 (1970), it has been clear that entitlement to welfare payments and to unemployment compensation are property rights protected by the due process clause and not mere privileges, which States can take away or impede at will. In *Goldberg v. Kelley*, Justice Brennan said:

> ". . . *The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."' Shapiro v. Thompson*, 394 US 618, 627, n 6, (1969). *Relevant constitutional restraints apply as much to the withdrawal of public assitance benefits as to disqualification for unemployment compensation, Sherbert v. Verner*, 374 US 398, (1963); or to denial of a tax exemption, *Speiser v. Randall*, 357 US 513, (1958); or to discharge from public employment, (Citation)." (at 296 of 25 LE 2d, emphasis supplied)

See also *Wheeler v. Montgomery*, 397 U.S. 280, 25 L. Ed. 307, (1970); and *Daniel v. Goliday*, — U.S. — 26 L. Ed 2d 57 (1970).

The above language in *Goldberg v. Kelly*, indicates that its holding *a fortiori* applies to claimants for unemployment compensation.

Appellants' argument that *Goldberg's* principles should not be applied to unemployment compensation claimants is based upon appellants' erroneous premise that the unemployment insurance program is not related to need. The purposes of the California Code and of the Michigan Act quoted *supra* at pages 8 and 9, indicate that unemployment insurance laws are mainly designed to maintain purchasing power for unemployed persons and their families because of their immediate loss of income and to keep such persons off the welfare rolls. These purposes *are* related to need and to welfare statutes.

This Court recognized the financial need of claimants for unemployment insurance in *Nash v. Florida Industrial Commis.*, 389 U.S. 235 (1967). In *Goldberg*, this Court relied in part upon *Nash*.

Appellants contend (at pp. 15, 16 of their Brief) that the employers will be harmed because compensation paid

claimants is essentially unrecoverable. This Court rejected a similar argument in *Nash, supra,* at 238 of 389 U.S.

Furthermore, the employer cannot be hurt because, if it ultimately prevails, there is no charge against the experience rating account upon which the employers unemployment insurance contributions are based. (Section 1335(b) of the Calif. Code).

The beneficial purposes of the Social Security Act are similar to the aforequoted purposes of the California Code and of the Michigan Act. In this regard, see *Sayers v. Gardner,* 380 F. 2d 940 (6th Cir. 1967), where the Court by Judge McAllister, said:

> "*The Act was adopted* pursuant to a public policy unknown to the common law, *designed for the protection of society, and enacted to alleviate the burdens* which rest on large numbers of the population because of the insecurities of modern life, *particularly those accompanying* old age, *unemployment,* and disability, *through the establishment* in advane *of a* provident *fund for the needy worker, out of which he will be paid* disability *benefits,* annuities, *and compensation;* and there is no question that the Social Security Act is constitutional." (at 942; emphasis supplied)

See also *United States v. Silk,* 331 U.S. 704, 712, 721 (1947).

The purpose of legislation governs its interpretation. It is also an essential factor in determining the validity of legislation. See, for example. *Porter v. Shibe,* 158 F. 2d 68, 73 (10th Cir. 1946), where the Court said:

> "*The due process guaranty of the Fifth Amendment demands* only *that the law* shall not be unreasonable, arbitrary or capricious, and that the means

selected *shall have a real and substantial relation to the object sought to be attained.*" (Emphasis supplied.)

See also *Minski v. United States,* 131 F. 2d 614 (6th Cir. 1942), *certiorari* denied, 319 U.S. 775 (1943).

Compare *Strauder v. West Virginia,* 100 U.S. 303, 25 Sup. Ct. 664, 666 (1880), where this Court stressed the breadth of the 14th Amendment protections.

Compare *Fox v. Employment Sec. Commis.,* 379 Mich. 579 (1967), where the Michigan Supreme Court held unconstitutional Section of the Michigan Employment Security Act which provided that such benefits must be offset or reduced by Workmen's Compensation received by the employee. The Court said, in part:

> "*In determining what is* within legislative discretion and what is *arbitrary,* regard must be had for the particular subject of the State legislation. *There must be a relation between the classification and the purposes of the act in which it is found.*" (At 588; emphasis supplied.)

See also Justice Brandeis' dissent in *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389 (1928), where he said:

> ". . . *the classification must insist upon a difference which is real,* as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that *the object of the classification must be the accomplishment of a purpose or the promotion of a policy,* which is within the permissible functions of the State; and that *the difference must bear a relation to the object of the legislation which is substantial,* as distinguished from one which is speculative, remote or negligible. . . ." (At 406, emphasis supplied.)

The majority held that the classifications in the Statute were not "based on a real and substantial difference having reasonable relation to the subject of the legislation." (At 402).

See also *Independent Gasoline Co. v. Bureau of Unemployment Compensation*, 190 Ga. 613, 10 S.E. 2d 58, 60 (1940) *certiorari* denied, 311 U.S. 707 (1940); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 196 N.E. 2d 124, 132, 133 (1952), *certiorari* denied, 344 U.S. 837 (1952); and *Washington Natinonal Ins. Co. v. Board of Review of N. J. Unemployment Comp. Comm.*, 1 N.J. 545, 64 A. 2d 443, 446, 447 (1949).

The above authorities support appellees' position that Section 1335 of the California Code deprive them and other workers of property without due process of law because it is arbitrary and unreasonable in light of the purposes of unemployment compensation laws.

Section 1335 of the California Code inherently results in delays in the payment of unemployment insurance to claimants who do not receive full payment of their compensation until months after they become unemployed. Section 1335 is, thus, contrary to the express purposes of the California Unemployment Insurance Code itself as well as to the purposes of the Federal unemployment insurance program.

III.

THE DISTRICT COURT WAS NOT OBLIGATED TO DRAW GUIDELINES TO "SAVE" SECTION 1335 OF THE CALIFORNIA CODE AS SUGGESTED BY APPELLANTS.

Appellants argued that the District Court should have avoided holding Section 1335 of the California Statute unconstitutional and instead drawn guidelines to meet Federal policy. The Court held that Section 1335 was contrary to the purposes of the California Code and to Federal Statutes and policy as well as to the United States Constitution (A. 138, 139).

The District Court had no obligation to, as appellants now for the first time suggest, draw a "guideline" for a proper administration of the Statute. The California Legislature, presumably with the assistance of appellants and their counsel, the California Attorney General, can amend Section 1335 to "save" it or can draw such guidelines.

CONCLUSION

Based upon appellees' pleadings and Briefs and for the reasons stated herein, this Honorable Court should affirm the decision of the District Court.

Dated: January 13, 1971.

Respectfully submitted,

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APPENDIX A

Unemployment Insurance Code of California

Sec. 101. This part is a part of a national plan of unemployment reserves and social security, and is enacted for the purpose of assisting in the stabilization of employment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry defeat the very purposes of this law as set forth in this article. Therefore when existing federal legislation which provides for a tax upon the payment of wages by employers in this State, against which all or any part of the employer contributions required under this part may be credited is repealed, amended, interpreted, affected or otherwise changed in such manner that no portion of such contribution may be thus credited, then upon the date of such change, the provisions of this part requiring employer contributions and providing for payment of unemployment compensation benefits shall cease to be operative and any assets in the Unemployment Fund or Unemployment Administration Fund shall in the discretion of the State Treasurer be held in the then existing depositaries or otherwise in the State Treasury. In the case of the Unemployment Administration Fund, such money may thereafter be dealt with by the State Treasurer pursuant to the conditions of the grant thereof to the State by the United States Government or agency thereof.

Sec. 1326. Claims for unemployment compensation benefits shall be made in accordance with authorized regulations. Except as otherwise provided in this article, bene-

fits shall be promptly paid if the claimant is found eligible or promptly denied if the claimant is found ineligible.

Sec. 1327. A notice of the filing of a new or additional claim shall be given to the employing unit by which the claimant was last employed immediately preceding the filing of such claim, and the employing unit so notified shall submit within 10 days after the mailing of such notice any facts then known which may affect the claimant's eligibility for benefits.

Sec. 1328. The facts submitted by an employer pursuant to Section 1327 shall be considered and a determination made as to the claimant's eligibility for benefits. The claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 and authorized regulations shall be promptly notified of the determination and the reasons therefor and may appeal therefrom to a referee within 10 days from mailing or personal service of notice of the determination. The 10-day period may be extended for good cause. The director shall be an interested party to all appeals.

Sec. 1335. If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:

(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issues set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or

(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any

action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

vs.

JUDITH JAVA, et al.,
Appellees.

On Appeal From the United States District Court For the Northern District of California

BRIEF OF CALIFORNIA RURAL LEGAL ASSISTANCE, ET AL., AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The California Rural Legal Assistance, Atlanta Legal Aid Society, Legal Aid Bureau of Baltimore, Boston Legal Assistance Project, Camden Regional Legal Services, Legal Aid Society of Cleveland, Dallas Legal Service Foundation, Legal Aid and Defender Society of Greater Kansas City, and New Orleans Legal Assistance Corporation [hereinafter the "Legal Aid Societies"] are legal aid organizations providing legal assistance to indigent individuals in the communities they serve. A substantial proportion of the clients of each of the Legal Aid Societies consists of unemployed workers who have lost their jobs

due to a depression of the local economy, the seasonal nature of their employment, an industry-wide economic decline, or other factors beyond the workers' control.[1] For these individuals unemployment insurance benefits frequently provide the principal if not the only source of family sustenance.[2] State administrative procedures such as California Unemployment Insurance Code §1335 which permit the summary termination of benefit payments to eligible recipients not only impose additional legal and financial burdens on the average unemployed worker,[3] they may also threaten his family's very survival.[4]

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[1]Each of the legal aid societies represents a large number of individuals who have legal problems caused by unemployment. Between July 1, 1969 and June 30, 1970, for example, the California Rural Legal Assistance accepted almost as many unemployment insurance and related cases (1,007) as welfare cases (1,279). During this period, 38% of CRLA's clients were low-income "working poor."

[2]*See* Stein, *Work History, Attitudes and Income of the Unemployed,* 86 Monthly Labor Rev. 1405, 1411 (1963). Since unemployment insurance benefits constitute on the average only one-third of the recipient's former income, *see* U.S. Bureau of the Census, Statistical Abstract of the United States 292 (1970), unemployment insurance recipients must make substantial adjustments in their standard of living. For example, approximately 26% of all unemployment insurance claimants curtail their family's food expenses and 32% curtail their medical expenses within the first few weeks of unemployment. *See* P. Klein, Financial Adjustments to Unemployment 35, 40 (1965).

[3]Many unemployment insurance claimants are beset with legal problems as a result of their unemployment. Approximately 30% of all claimants become delinquent in payments on old appliances; 22% become delinquent in payments on new appliances; 14% become delinquent in rent payments; and 10% become delinquent in automobile payments. *See* P. Klein, Financial Adjustments to Unemployment 31 (1965). The legal problems of the average unemployment insurance recipient would increase substantially if his benefits were terminated leaving him with no income whatever.

[4]The economic effect on the average recipient of a wrongful termination of unemployment insurance benefits is discussed in Section III of this Brief, *infra.*

Two recent court proceedings dealing with the due process rights of California unemployment insurance recipients reveal the acute hardship suffered by recipients whose benefits are summarily terminated. In *Coronado v. California Department of Human Resources Development,* Los Angeles County Superior Court No. 974004 (preliminary injunction granted May 25, 1970) a recipient whose benefits were wrongfully terminated was unable to feed his family and was faced with imminent repossession of all his household furniture. In *Crow v. Shultz,* Civil No. 70 1128 ACW (N.D. Cal., October 12, 1970) a recipient whose benefits were wrongfully terminated was unable to make mortgage payments and was faced with loss of her family home. In both of these cases, the threatened harm was especially acute since the recipient was not eligible for welfare assistance.

Because the wrongful termination of unemployment insurance benefits can have disastrous legal, economic, and personal consequences for substantial numbers of the Legal Aid Societies' clients and for other persons similarly situated, the Legal Aid Societies urge that unemployment insurance recipients, like the welfare recipients in *Goldberg v. Kelly,* 397 U.S. 254 (1970), are entitled under the due process clause of the Fourteenth Amendment to a hearing prior to the termination of benefit payments. Although this brief is confined to the due process issue, the Legal Aid Societies fully support the ruling by the court below that the summary termination of unemployment insurance benefits for a period of six weeks pending an employ-

er's appeal violates not only the due process clause of the Fourteenth Amendment, but also the Social Security Act's requirement that unemployment insurance benefits be fully paid when due. 42 U.S.C. §503 (a)(1).

INTRODUCTION

Both parties to this case agree that due process is a flexible concept, which balances such factors as the reason for government action, the adverse impact of this action on the individual, and the alternatives available to the government to achieve its desired ends. *See Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 162-63 (1951) (Frankfurter, J.) (concurring opinion). In applying the due process balancing formula to the present case, however, the appellant California Department of Human Resources Development [hereinafter "the Department"] incorrectly interjects into the balance an alleged interest of the employer in not being deprived of his property without a prior hearing. As is shown in Section I of this brief, the employer's right to a prior hearing is in no way affected by the payment of benefits pending a referee hearing, since no charges for benefits previously paid are levied against the employer's reserve account if he is successful in his appeal. The alleged interest of the employer in this case is actually the interest of the Department in limiting the expenses of administering the unemployment insurance system.

The proper application of the due process formula weighs heavily in favor of requiring a hearing prior to the termination of unemployment insurance benefit payments to recipients whom the Department has found eligible for benefits. As is shown in Section III of this brief, the wrongful termination of unemployment insurance benefits can result in the average recipient being deprived of food, housing, medical care, and other necessities of life. The summary termination of benefits is also contrary to the public interest in maintaining an unemployed worker's purchasing power, since it prevents the prompt payment of benefits to eligible recipients and fosters the inaccurate resolution of disputed claims. *See* Section IV, *infra*. Balanced against this recipient and public interest in the payment of unemployment insurance benefits pending a hearing is the Department interest in minimizing expenses and conserving administrative resources. This interest is only minimally affected, however, since recipients are found eligible for benefits in the majority of appealed cases and since the Department has available proved methods of recouping any overpayments that should occur. In fact, the additional Department expenditures necessitated by the lower court's decision have amounted to less than .03% of the California unemployment insurance fund, and employer taxes have decreased substantially since the lower court's injunction became effective. *See* Section V, *infra*.

In its brief, the Department contends that this Court's description of the "brutal need" of welfare

recipients in *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) mandates a restriction of the right to a prior due process hearing to cases of welfare benefit termination. When government action seriously injures an individual, a prior hearing is the norm under due process, rather than the exception. *Cf. North American Storage Co. v. Chicago*, 211 U.S. 306 (1908). It would be anomalous indeed if the Court's recognition of the procedural due process rights of welfare recipients in *Goldberg* was used to curtail the procedural rights of unemployment insurance recipients, whom the Court has previously ruled are entitled to due process protections, *Sherbert v. Verner*, 374 U.S. 398 (1963), and whose needs usually approach if not equal those of welfare recipients.[5]

[5]In describing the reliance of welfare recipients on welfare benefits to obtain the necessities of life, the Court in *Goldberg* cited Nash v. Florida Industrial Commission, 389 U.S. 235 (1967). In *Nash*, the Court struck down an unlawful state restriction on eligibility for unemployment insurance compensation, pointing out that the termination of unemployment compensation would cause a man of modest means to "risk financial ruin." 389 U.S. at 239. As a practical matter, the needs of the majority of unemployment insurance recipients approximate those of welfare recipients. *See* Section III, *infra*.

ARGUMENT

The summary termination of unemployment insurance benefits pending a referee hearing violates due process, since it imposes severe economic hardship on eligible recipients while serving no significant governmental or employer interests.

I.

THE EMPLOYER'S "RIGHT TO BE HEARD" IS NOT AFFECTED BY THE PAYMENT OF UNEMPLOYMENT INSURANCE BENEFITS PENDING A REFEREE HEARING.

Throughout its brief, the Department refers to the due process question in this case as requiring the balancing of "the employer's right to be heard before his property is taken" against the prejudice to the recipient from the summary termination of his benefits. Appellants' Brief 11. In fact, the procedures at issue in this case have no effect whatever on the employer's right to a full due process hearing before being charged with any or all amounts paid to the recipient.

The resolution of an unemployment insurance claim involves two distinct issues: (1) whether the recipient is entitled to be paid benefits; and (2) whether, if the recipient is paid benefits, his former employer's reserve account[6] is to be charged with any or all of the benefits paid. These issues are separable. In certain cases, an unemployment insurance recipient may be paid benefits but his employer's account not be charged. *E.g.* Cal. Unemp. Ins. Code §§1380, 3702

[6]An employer's reserve account is a book account used as a factor in determining that employer's experience rating. An employer's tax contribution rate may be increased if additional charges are made against his reserve account and his experience rating is adversely affected. Cal. Unemp. Ins. Code §§1026, 1028 (Supp. 1970).

(Supp. 1970). In these cases, all benefits paid to a recipient are charged against the unemployment insurance fund's balancing account, which is a general account made up of uniform contributions by all employers, rather than against the particular employer's reserve account. Cal. Unemp. Ins. Code §976.5 (Supp. 1970).

The question affecting the employer in each unemployment insurance case is not whether the employee is paid benefits but rather whether the employer's reserve account is to be charged.[7] Under the provisions of California Unemployment Insurance Code §1380, an employer may not be charged for any amounts paid by the Department pursuant to an erroneous or unlawful eligibility determination. If, pursuant to the decision of the court below, benefits are paid pending a referee hearing to a recipient against whom an employer files an appeal, and if following the employer's appeal the referee determines that the recipient is not entitled to benefits, the referee must charge all benefits paid against the general balancing account rather than the employer's reserve account. Thus, regardless of a procedure requiring the continuation of benefit payments to a recipient pending an employer's appeal, the employer would receive a

[7]In states where the unemployment insurance fund does not maintain separate employer reserve accounts or experience rating systems, most employers never appeal determinations awarding benefits to claimants. *See* J. Beker, The Problem of Abuse in Unemployment Benefits 391 (1953). This is largely due to the fact that the employer does not have a direct financial stake in the outcome of the claim. *Id.* at 334.

full hearing before financial liability is imposed upon him.

Although the California Employers' *amicus* brief acknowledges that the payment of benefits pending an employer appeal would impose no direct financial liability upon the particular employer involved, it argues that the general payment of benefits pending employer appeals would reduce the balancing account thereby increasing the taxes of all employers, and that the imposition of this general increase would deny employers due process. Brief of Southern California Edison Company 6. In a case dealing with charges against employer reserve accounts in a workman's compensation system, the Court held that this remote possibility of a tax increase is not a sufficient injury to the employer to merit due process protection. *Gange Lumber Co. v. Rowley,* 326 U.S. 295, 305 (1945). Moreover, contrary to the exaggerated speculations of the employers, employer balancing account taxes have not increased following the issuance of the lower court's injunction, rather they have decreased to a new low.[8]

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[8] *See* California Department of Human Resources Development, *Low Tax Rate Seen for 1971,* 24 Human Resources Development Newsletter 1 (September, 1970).

As one of a general class of taxpayers, the employer does not have a constitutionally protected interest in the results of a given unemployment insurance eligibility determination. *Cf.* Frothingham v. Mellon, 262 U.S. 447 (1923). His interest in a given unemployment determination insofar as the balancing account is concerned is the same as the interest in a particular welfare case of a taxpayer concerned about rising welfare costs.

II.

AN UNEMPLOYMENT INSURANCE RECIPIENT WHO HAS BEEN ADMINISTRATIVELY DETERMINED TO BE ELIGIBLE FOR BENEFITS IS ENTITLED TO THE PROTECTIONS OF PROCEDURAL DUE PROCESS.

In pointing out that the unemployment insurance "trust fund" is composed of tax contributions of private employers rather than general tax funds, the Department urges that the state is a mere stakeholder in a private insurance program. Appellants' Brief 13. In *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 301 (1945) this Court held that a workman's compensation reserve fund made up solely of the employer tax contributions was "in no sense the private property of the employer," since "the moneys when collected are public moneys, held and administered by the state." Unemployment insurance is a government rather than a private benefit, and in administering the unemployment insurance system, the Department is subject to the Fourteenth Amendment's requirements of procedural due process. *Cf. Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

In holding that a welfare recipient who had initially been found eligible for benefits was entitled under the Fourteenth Amendment to a hearing before the termination of benefit payments, the Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970) stated that an individual's right to procedural due process when threatened with a withdrawal of government benefits followed from his having met the statutory criteria for entitlement to benefits. *Id.* at 262. The Court did

not explicitly state when an individual's statutory entitlement to government benefits is sufficiently established to merit the full protections of procedural due process, but the only practical means of classifying individuals who are entitled to full due process protection is to distinguish between recipients, who have been thoroughly investigated by the appropriate state administrative agency and have been found to have satisfied the statutory eligibility criteria, and initial claimants, who assert eligibility but whose right to benefits has never been officially established. For example, if the right to a hearing before the withholding of welfare benefits were extended to initial welfare applicants, large numbers of ineligible individuals might apply for welfare knowing that they would be paid pending a hearing, and a huge amount of welfare funds would be expended paying unrecoverable benefits to these ineligible claimants. As a practical matter, until an individual has officially established his eligibility his interest in the receipt of government benefits is too remote to entitle him to a prior due process hearing.

The California unemployment insurance recipient whom the Department has found eligible for benefits and against whom an employer appeal has been filed has the same interest in the continued receipt of benefit payments as the welfare recipient in *Goldberg* who has been found eligible for welfare and whose eligibility has subsequently been challenged by a welfare official. In both cases the appropriate state administrative

agency has thoroughly investigated the individual's claim for benefits.[9] In both cases the administrative agency has ruled that the individual meets the statutory requirements for eligibility.[10] In both cases this determination is subsequently challenged by an *ex parte* assertion that eligibility does not in fact exist.

The Department incorrectly assumes that if the lower court's decision in this case is sustained, unemployment insurance benefits would have to be paid pending appeal to initial applicants whom the Department has ruled ineligible for benefits as well as to recipents whom the Department has found eligible. Based upon this false assumption, the Department

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[9]The Department suggests that the administrative eligibility determination ruling is not a meaningful determination of whether an individual meets the unemployment insurance eligibility requirements. Appellants' Brief 16. The court below, in a detailed factual finding supported by abundant evidence, ruled that the eligibility determination ruling was the meaningful Departmental determination. Joint Appendix 135-37. In the making of the eligibility determination ruling, Department operating procedures require the conducting of a detailed investigation, the collecting of all available evidence, the hearing and if necessary the rehearing of all parties, and the rendering of a formal ruling. Joint Appendix 116-23.

[10]The Department erroneously suggests that an initial eligibility determination does not become "final" until ten days after it is rendered. *See* Appellants' Brief 19 n.14. As a practical matter, the eligibility determination ruling ends the Department's investigation of eligibility, as is shown by the fact that benefits are immediately commenced if the ruling is favorable to the claimant. If an appeal from the eligibility determination ruling is filed, the Department does not reopen the investigation. *See* Joint Appendix 124-26. The expiration of ten days offers the recipient no protection from a summary termination of benefits, since under Section 1335 benefits are terminated even if the employer files his appeal more than ten days after the Department's determination. If the appeal is filed beyond the ten day period, the employer must justify his delay at the referee hearing, but the recipient is in no way compensated for the delay. Cal. Unemp. Ins. Code § 1328.

projects huge estimates of the expenses and resulting tax increases that would be required. If the Court, consistent with its decision in *Goldberg,* limits the right to a due process hearing to individuals whom the Department has held eligible for unemployment insurance benefits, only a minimal expenditure of funds would result.[11]

III.

THE SUMMARY TERMINATION OF UNEMPLOYMENT INSURANCE BENEFITS IMPOSES SEVERE ECONOMIC HARDSHIP ON ELIGIBLE RECIPIENTS.

In assessing the impact of government action for the purpose of determining the requirements of procedural due process, one must look to the normal consequence of the government's action rather than to the exceptional circumstance. For example, some workers may not suffer severe harm if their paychecks are garnished. In *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 341-42 (1969), however, the Court ruled that because of the likelihood that in the majority of cases pre-judgment garnishment "may as a practical matter drive a wage-earning family to the wall," due process required a hearing prior to the seizure of a worker's paycheck. In the case *sub judice,* the likelihood of the poor family being "driven to the wall" by a wrongful termination of unemployment

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[11] As is shown in Part V of this brief, *infra,* the expenditure of funds necessitated by the lower court's injunction has been 494 times lower than the projections in the Department's Jurisdictional Statement and has amounted to less than .03% of the amount in the California Unemployment Insurance Reserve Fund.

insurance benefits is far greater than was the likelihood of severe economic deprivation in *Sniadach*, for unlike Mrs. Sniadach, who received from her garnished paycheck a statutory "subsistence allowance" of $25.00 to $40.00, 395 U.S. at 338 n.1, the terminated unemployment insurance recipient receives nothing to support himself and his family pending a hearing of his case.

By focusing on the fact that no means test is applied for unemployment insurance eligibility, the Department ignores the vital role played by unemployment insurance benefits in the lives of the vast majority of unemployed workers. Instituted to prevent a recurrence of the severe economic deprivations caused by the depression, unemployment insurance supplanted much of the protection against economic disaster formerly afforded unemployed workers through state relief payments. *Cf.* H.R. Rep. No. 615, 74th Cong., 1st Sess. p. 7 (1935). For hundreds of thousands of unemployed workers each year, unemployment insurance benefits provide vitally needed protection against the deprivations of poverty. *Cf.* Wickenden, *Unemployment Insurance and the War on Poverty*, 2 Unemp. Ins. Rev. 26 (1965).

For the average worker, unemployment imposes severe financial hardships despite the receipt of unemployment insurance benefits. After the worker applies for benefits, he must wait for two or more weeks before payment of benefits is begun. Joint Appendix 131-32. After he begins drawing benefits, the benefit checks he receives constitute only a fraction of his

former salary.[12] In order to adjust to the acute curtailment of family income, the average worker must reduce expenses for such items as food, housing and medical care, usually within the first few weeks after losing his job.[13] Unemployment insurance benefits thus sustain the recipient at a greatly reduced standard of living and render him economically vulnerable. Should benefits be terminated, the recipient would face the prospect of severe economic deprivation.

The Department's own statistics confirm that the average unemployed worker depends for sustenance on unemployment insurance benefits. From November 1968 through October 1969, the median annual earnings of persons filing unemployment insurance claims in California was $4,300. Affidavit of Nicolo Pino, *Coronado v. California Department of Human Resources Development,* Los Angeles County Superior Court No. 974004. Pursuant to California Unemployment Insurance Code §9110 (Supp. 1970), the Department has established the following income standards for defining "economically deprived" California families:

Husband, wife and 1 dependent	$4,100
Husband, wife and 2 dependents	5,200
Husband, wife and 3 dependents	6,200

[12]In 1969, unemployment insurance benefits nationally constituted an average of 34.3% of the worker's former salary. *See* U.S. Bureau of the Census, Statistical Abstract of the United States 292 (1970). In California, benefits constituted an average of 36.9% of the worker's former salary. *Id.*

[13]*See* P. Klein, Financial Adjustments to Unemployment 3, 40 (1965); *cf.* Comment, *The Relationship of Unemployment to Mortgage Foreclosures,* 86 Monthly Labor Rev. 1421 (1963).

By the state's own criteria, the average family drawing unemployment insurance is on the brink of "economic deprivation." The wrongful termination of benefits for a period of several weeks is thus likely to cause economic catastrophe.

For the unemployment insurance recipient whose benefits are summarily terminated, welfare or charity poses a cruel[14] and usually inadequate substitute for unemployment insurance payments. As a practical matter, welfare is totally unavailable for most single men and women and many married couples of working age who have no dependents.[15] Since an individual must own less than $600.00 in personal property to be eligible for welfare assistance, Cal. Welf. & Inst. Code §11257 (Supp. 1970), an unemployment insurance recipient with dependents must dispose of nearly all his assets before he can receive welfare. When and if an unemployed worker qualifies for welfare, the amount of his welfare benefits is usually considerably

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[14]As Congress recognized in instituting a national unemployment insurance program, the worker who looks upon receiving welfare as a source of embarrassment may lose his dignity and self-respect by being forced to apply for assistance. *See* Douglas, Standards of Unemployment Insurance 20 (1933).

[15]In most counties, only minimal welfare assistance is available unless an applicant qualifies for state programs of Aid to the Disabled, Aid to the Blind, Old Age Assistance, or Aid to Families with Dependent Children, Cal. Welf. & Inst. Code §§ 11200, 12000, 12500, 13500. For the family not qualifying for one of the state programs, the average welfare payment in California is $16.77 per week. *See* California Department of Human Resources Development, Public Welfare in California, Statistical Series PA3-152, at Table 11b (September, 1970); Silver, *The Imminent Failure of Legal Services For the Poor: Why and How to Limit Caseloads*, 46 U.Det.J. of Urban Law, 217, 229 (1969).

less than the amount he would have received in unemployment insurance benefits.[16]

IV.

THE SUMMARY TERMINATION OF UNEMPLOYMENT INSURANCE BENEFITS REGARDLESS OF THE MERITS OF THE RECIPIENT'S CASE FOSTERS THE INACCURATE RESOLUTION OF DISPUTED CLAIMS AND PREVENTS THE PROMPT PAYMENT OF BENEFITS TO ELIGIBLE RECIPIENTS.

The prompt payment of unemployment insurance benefits to all eligible recipients serves not only the interests of the recipients, but important governmental interests as well. Because unemployment insurance enables a worker to maintain his purchasing power through a period of unemployment, it promotes economic stability and aids the general economy. *See* Cal. Unemp. Ins. Code §§100, 101. By tiding workers over when they otherwise would have no income, it also reduces the burden on the public welfare rolls. *Cf.* H.R. Rep. No. 615, 74th Cong. 1st Sess, P. 7 (1935). The same public interests which counsel the institution of an unemployment insurance system also counsel the uninterrupted payment of benefits to all those eligible to receive them. *See Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

The automatic termination of benefits regardless of the merits of the recipient's case runs counter to both the governmental and recipient interest in the prompt

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[16]In the case *sub judice*, plaintiff Caroll Hudson received a welfare grant that was $100 per month less than the amount of her unemployment insurance benefits. Joint Appendix 11.

payment of unemployment insurance benefits to all eligible recipients. Without requiring the employer to present even a colorable showing that the recipient may be ineligible, Section 1335 terminates benefits for approximately six weeks despite the fact that the Department has concluded, after thorough investigation, that the recipient is entitled to benefits. According to the Department's own figures, this results in the objective of prompt payment of benefits to eligible recipients being frustrated in 64% of the appealed cases. Department Jurisdictional Statement, Appendix C, at 14.

In addition to delaying benefit payments to eligible recipients, Section 1335 tends to coerce eligible recipients to abandon meritorious claims. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341 (1969) the Court noted that the garnishment of a worker's wages tended to force the worker to accede to unmeritorious demands of creditors. Faced with the need to provide the necessities of life for himself and his family, the unemployment insurance recipient likewise can scarcely devote the time and energy necessary to prosecute his case effectively. *Cf.* Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234, 1244 (1967). Instead of waiting without funds for the six weeks before a referee hearing is held, the worker may accept substandard, menial employment rather than attempting to assert his right to benefits.[17] Thus, because of the severe financial

[17]Since many recipients view referee hearings as formal judicial proceedings, they are hesitant to undergo what they view as the ordeal of a "trial." *See* Harris, *Claimant Views of Unemployment Insurance Administration in California*, 4 Unemp. Ins. Rev. 2, 5 (1967).

pressures on claimants who have no source of income pending appeal, eligible recipients are likely to abandon appealed cases.[18]

V.

THE ADDITIONAL ADMINISTRATIVE BURDENS AND FINANCIAL EXPENDITURES RESULTING FROM THE PAYMENT OF BENEFITS PENDING A REFEREE HEARING ARE MINIMAL, SINCE RECIPIENTS ARE FOUND ELIGIBLE IN THE MAJORITY OF APPEALED CASES AND SINCE THE DEPARTMENT HAS AVAILABLE PROVED METHODS OF RECOUPING OVERPAYMENTS.

A principal due process issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *aff'g Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), was the weight to be afforded the government's interest in conserving fiscal and administrative resources when set against a welfare recipient's interest in not being wrongfully deprived of assistance, 397 U.S. at 261. The expenses necessitated by a prior hearing in *Goldberg* were substantial, since 64% of the recipients who appealed ultimately were determined to be ineligible, 294 F. Supp. at 901 n.17 (S.D.N.Y. 1968), and since any benefits paid to ineligible recipients pending a hearing were likely to be unrecoverable, 397 U.S. at 266. Moreover, since welfare recipients would know that appealing a termination of benefits would result in continued receipt of funds pending appeal, the num-

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[18]Section 1335 is an open invitation to an employer's filing a frivolous appeal in the hope of coercing the employee to abandon his claim. An employer risks nothing by filing a frivolous appeal, and he gains a substantial possibility that the employee will default, thereby removing a potential charge against his unemployment insurance reserve account.

ber of appeals filed would presumably rise and the burden on administrative resources would increase. Despite these large administrative and fiscal costs, the Court concluded that

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.
>
> 397 U.S. at 266.

In contrast to the sizeable expenditure of unrecoverable overpayments necessitated by the prior welfare hearings in *Goldberg,* the payment of unemployment insurance benefits pending an employer appeal would entail minimal depletion of Department fiscal resources. During 1969, 63.5% of the employer appeals resulted in decisions favorable to the recipient and therefore entailed no erroneous payment of benefits. *See* Department's Jurisdictional Statement, Appendix C, at 16. In cases where payments were made to ineligible recipients, the Department was successful in recouping 64% of the amounts paid. *Id.* at 15.[19] The payment of unemployment insurance benefits pending an employer appeal would thus result in a small amount of overpayments which would largely be recoverable.

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[19]Unlike welfare recipients, who are often unemployable and therefore likely to remain judgment proof, unemployment insurance recipients must be able to work and available for work. Cal. Unemp. Ins. Code § 1253. Unemployment insurance recipients who are overpaid when they are unemployed are thus likely to get a job and become solvent in the future.

The payment of unemployment insurance benefits pending an employer appeal would reduce rather than increase the administrative burden of handling appeals. Since appeals are filed by the employer, the recipient's potential receipt of benefits pending appeal does not serve as an inducement to the filing of more appeals. In fact, the number of appeals should be reduced, since employers would have less incentive to file frivolous appeals in the hope that the recipient will default. Unlike welfare, where the payment of assistance pending appeal tends to increase the number of appeals filed, the payment of unemployment insurance benefits pending an employer appeal would tend to decrease the number of appeals filed.

The Department presents elaborate cost estimates allegedly showing that the unemployment insurance reserve fund will lose millions of dollars each year if benefits are paid pending an employer's appeal. Department Jurisdictional Statement, Appendix C. These estimates are erroneous since they are based on the false assumptions that all persons would immediately be paid benefits upon applying for unemployment insurance, that benefit payments would be continued pending appeal for individuals whose claims are rejected by the Department, and that no overpayments would ever be recovered. *Id.* at 15, 17. However, if one uses the Department's figures but considers only the recipients who have initially been found eligible by the Department, who have lost in the employer appeal hearing, and who have failed to repay benefits received, one finds that the payment of benefits pending appeal would have cost $337,836 dur-

ing 1969.[20] In light of the fact that as of June, 1970 the California Unemployment Insurance Reserve Fund had a surplus of over $1.3 billion,[21] this expense would constitute less than a .03% charge against the fund. Since the California Unemployment Insurance Reserve Fund has been growing at a rate of over $92 million per year[22] (over 272 times the cost of paying benefits pending an employer appeal), the impact of this expense on employer taxpayers would be negligible.

In view of the minimal cost of paying benefits pending an employer appeal, it is not surprising that, contrary to the Department's dire predictions, employer taxes have not increased following the issuance of the lower court's injunction. Instead, employer taxes have decreased since the lower court's ruling took effect,[23] despite a substantial rise in the California unemployment rate. According to Department projections, the balancing account tax will be a new

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[20]According to Appendix C of the Department's Jurisdictional Statement, 2,990 Department determinations awarding benefits to an employee were reversed by a referee following an employer appeal in 1969. During this period, the median time elapsed between the filing of an appeal and the rendering of a referee decision was six weeks, and the average weekly benefit paid was $52.00. Thus, a total of $932,880 would have been paid to ineligible employees. However, since 64% of the benefits paid to ineligible employees were recovered by the Department, the net loss to the Unemployment Insurance Reserve Fund would have been only $337,836.

[21]*See* California Department of Human Resources Development, *California Fact Sheet*, 24 Human Resources Development Newsletter 4 (September 1970).

[22]*Id.*

[23]The District Court's injunction took effect on May 24, 1970. *See* Joint Appendix 2.

low of 0.6% during the tax year 1971.[24] The low experience rating tax schedule contained in California Unemployment Insurance Code §977 (Supp. 1970) will continue in effect and the taxable wage base determined by §930 (Supp. 1970) will remain at the lower level.[25]

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: January 8, 1971.

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[24] *See* California Department of Human Resources Development, *Low Tax Rate Seen For 1971*, 24 Human Resources Development Newsletter 1 (September 1970). Since benefits erroneously paid pending an employer appeal are charged against the unemployment insurance fund's balancing account, Cal. Unemp. Code § 976.5 (Supp. 1970), the balancing account tax would be most directly affected by the lower court's decision.

[25] *Id.*

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Motion to strike the Brief for the United States as Amicus Curiae or in the alternative for leave to file a reply thereto

On January 12, 1971, three days before the filing date for appellees' brief and after that brief was at the printer, appellees were served with page proofs of the Brief for the United States as Amicus Curiae in support of appellants. The Court noted probable jurisdiction in this case on October 26, 1970; appellants' brief on the merits was filed on December 2, 1970, rendering all amicus curiae briefs filed in support of appellants due likewise on December 2. Rule 42(2). Thus, the brief filed by the United States

was 41 days late. No justification was offered for violating Rule 42(2), and no prior notice was given to appellees that a brief would be filed in the case by the United States.

The Court, by requiring amicus curiae briefs supporting appellants to be filed at the same time as appellants' own brief and at least thirty days before that of appellees, seeks to assure that the responding side will have time to adequately consider all arguments opposed to its position. The United States, which files many amicus curiae briefs each year with this Court, is surely aware of Rule 42(2) and of its purpose. By filing after appellees' brief was necessarily due at the printer, the United States precluded appellees from responding to its presentation.

The brief filed by the United States in violation of Rule 42(2) is not essential to the complete elucidation of appellants' position. Appellants themselves have filed a jurisdictional statement and a brief on the merits. They have the opportunity to file a reply brief as well. In addition, seven other briefs amici curiae were filed on behalf of appellants before the brief of the United States. Thus, the United States' brief is not only untimely but also unnecessary.

For the aforementioned reasons, appellees respectfully pray that this Court strike the Brief for the United States as Amicus Curiae. In the alternative, appellees seek leave to file the attached responsive Supplemental Brief.

Dated January 28, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Supplemental Brief of Appellees in response to the Brief for the United States as Amicus Curiae

The arguments of the United States proceed from a misunderstanding of both the California unemployment insurance disbursement procedure and the premises underlying appellees' statutory and constitutional challenge to that procedure. As discussed on pages 27-32 of appellees' principal brief on the merits [hereinafter Appellees' Brief], the California eligibility determination is not a screening process (Brief for the United States as Amicus Curiae at 8, 10, 16, 18 [hereinafter U. S. Brief]). Rather, as the court below found, it is the product of a

thorough factual investigation in which all interested parties are afforded an opportunity to be heard.[1] Appellees have never urged that unemployment benefits may not be suspended upon an employer's appeal merely because, under the California procedure, they are paid immediately upon the initial determination. Our position is simply that as soon as all parties have been heard and a prompt determination of eligibility made, the Social Security Act and the Due Process Clause both require the full payment of unemployment benefits.

Unlike the eligibility determination in California, an initial decision in Washington, D. C. is based solely upon information provided by the claimant. D. C. Code § 46-311. *See D. C. Compensation Board v. Hahn*, 399 F. 2d 987, 989-990 (D.C. Cir. 1968). In enacting the District of Columbia unemployment compensation law, Congress provided for a stay of benefits to allow an employer an opportunity to be heard,[2] thus recognizing that information from employers is essential to a meaningful decision. In passing the D. C. stay provision, however, Congress in no way condoned a delay of benefits for a median period of seven weeks *after* an employer has had an opportunity to be heard—the procedure obtaining in California under Section 1335 of the California Unemployment Insurance Code. *See* Appellees' Brief at 24, n. 18; Brief for the AFL-CIO as Amicus Curiae at 10.

Nor does the fact that Congress knew at the time it passed the Social Security Act that 10 million people were unemployed suggest in any way that lengthy delays in paying benefits were contemplated. Under the scheme provided in the Act, no compensation is paid to a worker un-

1. *See* statistical analysis, Appellees Brief at 30.
2. D. C. Code § 46-311(b).

less he has worked for an employer paying taxes into a state unemployment fund. Therefore, those thrown out of work before the bill went into effect could not possibly be covered.[3] Indeed, Congress realized when it passed the Act that unemployment benefits would have no significant effect on the huge unemployment problem created by the economic collapse of the early 1930's. As the House Committee Report states:

> "It should be clearly understood that state unemployment compensation plans made possible by the bill cannot take care of the present problem of unemployment. They will be designed rather to afford security against the large bulk of unemployment in the future." *H. R. Rep.* No. 615, 74th Cong., 1st Sess., 7 (1935).

Congress intended the millions of people out of work at the time of the Social Security Act to be helped not by the unemployment insurance system but by another program, work-relief. *Id.* Thus, the unemployment scheme was not seen as a way out of the 1935 economic crisis and its procedures were not designed to handle an immediate deluge of claims. Rather, by assuring the payment of unemployment benefits during the initial stages of unemployment, Congress meant to prevent such disastrous large-scale unemployment in the future, thereby obviating the necessity for a scheme capable of processing a large proportion of the American work force at one time. *See* Appellees' Brief at 16-19.

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3. The Social Security Act provided, in fact, that no unemployment benefits be paid out until 1938, two years after the first taxes were collected under the program. The purpose of this provision was to assure enough time for sufficient funds to accumulate to place the new program on a sound financial footing. Section 903(a)(2) of the 1935 Social Security Act, 49 Stat. 620, 640. *Statement of Edwin E. Witte, Hearings on H. R. 4120, House of Representatives, Committee on Ways and Means*, 74th Cong., 1st Sess. 157 (1935).

Further, while the brief of the United States asserts that California's median seven week delay is constitutionally permissible and in conformity with the Social Security Act, the present activities of the Secretary of Labor belie that assertion.[4] Under the principle of cooperative federalism as embodied in the Social Security Act, the federal government can impose standards on the states only to assure conformity with the Act. The Secretary has power, then, to shorten the period in which benefits are suspended only if, under the present procedure, benefits are *not* being paid "when due". 42 U.S.C. 503(a)(1). If the Secretary, in fact, makes significant additions to current federal regulatory requirements for state participation in the unemployment compensation program in order to shorten the delay period, he does so only because he considers present delays unlawful. And, as the United States fails to recognize, under *Rosado v. Wyman*, 397 U.S. 397 (1970), the courts have a duty parallel to that of the executive branch to enforce the Social Security Act in an action brought by its beneficiaries when a provision of that Act is being violated.

Since the decision in the court below, California has been paying benefits to all employees found eligible at the initial determination, thus both assuring payment during the initial stages of unemployment and comporting with due process requirements. The United States proposes, however, that California might, if the decision below is affirmed, choose to abandon this efficient method in favor of one less effective but still permissible under the Due Process Clause. (U. S. Brief at 16-17). Yet the possible alternatives suggested by the United States are either not alternatives at all or are clearly prohibited by due process.

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4. U. S. Brief at 14.

Thus, California cannot change to procedures which "automatically set each claim down for hearing (in the absence of waiver by the employer)"[5] or "have the interviewer himself hold a hearing whenever a question of eligibility is raised,"[6] because the system currently employed fits either of these descriptions. Indeed, it is precisely because eligibility determinations are reached only *after* all interested parties have been heard that claimants declared eligible at this stage have an interest in their benefits sufficient to entitle them to procedural due process.

Were California to "refrain from paying benefits until after the employer's time to appeal expired" (U. S. Brief at 16), its procedure would then deprive not only appellees but hundreds of thousands of additional eligible recipients of benefits without due process of law.[7] Due process is violated by Section 1335 not merely because benefits once paid are terminated, but also because benefits found due after a thorough investigation in which both sides are heard are summarily withheld.

Finally, while a system requiring "the interviewer to defer decision and set the case down for hearing before a referee whenever the employer challenges a claim in writing"[8] might in fact be consistent with due process requirements, it would at the same time be completely infeasible administratively and would almost certainly result in a violation of the Social Security Act. In 1969, 99% of those claimants disqualified from receiving benefits because of the reasons they left their last jobs were found ineligible not upon an employer's appeal but at the initial eligibility

5. U. S. Brief at 16.

6. U. S. Brief at 17.

7. In 1968, 401,927 initial eligibility determinations were made in favor of claimants. (A. 105).

8. U. S. Brief at 17.

determination.[9] Were the California legislature to adopt the procedure the United States proposes, it would increase manyfold the burden upon the already overburdened referee system. The cost of hiring the many additional referees needed to make such a system function smoothly could not possibly be justified because the system in effect in California since the decision of the court below processes employers' objections quite efficiently and cheaply.[10] To change the current system in this direction without hiring commensurately more referees would cause lengthy delays before determinations are made, thereby violating the Social Security Act by assuring that benefits are *not* paid "when due"—during the initial stages of unemployment.

In contrast, the payment of benefits pending an employer's appeal *is* administratively and fiscally feasible. The California Unemployment Fund has continued to thrive since the decision of the court below. *See* Appellees' Brief at 54-55. As the United States notes at page 16 of its brief, Rhode Island specifically prohibits the suspension of benefits pending an employer's appeal. R. I. Gen. Laws 28-44-40. Despite this provision, employers are taxed at a lower rate in Rhode Island than in California.[11] From 1950 to 1969,

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9. 139,274 claimants were found ineligible for benefits for leaving their last employment under disqualifying conditions. Only 2,990 (1%) were ruled ineligible by a State referee upon an employer's appeal. J. S., App. C at 14.

10. Under the present procedure, there are only a small number of unrecouped overpayments (*See* Appellees' Brief at 46-47). To add the additional referees necessary to effectuate a system which delays deciding all disputed claims until after a referee's hearing would greatly increase the cost of administering the unemployment compensation program. It is extremely unlikely that this cost would be outweighed by savings of unrecouped overpayments.

11. In 1970, California's employers were taxed at a rate of 2.3% of taxable payrolls and 1.3% of total payrolls. During the same period, Rhode Island's employers were taxed at a rate of 1.8% of taxable payrolls and 1.1% of total payrolls. U. S. Dept. of Labor, Manpower Administration, Unemployment Insurance Program Letter No. 1053, April 20, 1970.

the amount of reserves available for benefits in Rhode Island has risen from $23,171,419.43 to $83,763,392.16. R. I. Dept. of Employment Security, 1969 Statistical and Fiscal Digest, 21.

Thus, the system employed in California since the ruling of the lower court is effective, constitutional and statutorily permissible; all those suggested by the United States are either that same system or are inefficient, unlawful and unconstitutional. It is hard to see, then, how the Court by upholding the decision below would be, as the United States intimates, opening the way for a system *less* beneficial to appellees and other claimants than the one presently provided by the State.

CONCLUSION

For the above mentioned reasons, and the reasons stated in appellees' principal brief, the judgment below should be affirmed.

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Dated: January 28, 1971

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. *v.* JAVA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 507. Argued February 24, 1971—Decided April 26, 1971

Section 303 (a)(1) of the Social Security Act requires a method of administration "reasonably calculated to insure full payment of unemployment compensation when due." In light of the intent of Congress to make payments available at the earliest stage of unemployment as is administratively feasible, in order to provide a substitute for wages, the language "when due" must be construed to mean when benefits are allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions. Since California's initial interview provides such a hearing, enforcement of § 1335 of the California Unemployment Insurance Code, providing for the withholding of insurance benefits upon an employer's appeal from the initial eligibility determination, must be enjoined because it conflicts with the requirement of § 303 (a)(1) of the Social Security Act.

317 F. Supp. 875, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court. DOUGLAS, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 507.—October Term, 1970

California Department of Human Resources Development et al., Appellants, v. Judith Java et al.	On Appeal From the United States District Court for the Northern District of California.

[April 26, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

This case raises the issue of whether a State may, consistent with § 303 (a)(1) of the Social Security Act, suspend or withhold unemployment compensation benefits from a claimant, when an employer takes an appeal from an initial determination of eligibility. Section 303 (a)(1) of the Social Security Act, 42 U. S. C. § 503 (a)(1), provides that benefits must be paid "when due."

In late summer 1969, appellees Judith Java and Carroll Hudson, having been discharged from employment, applied for unemployment insurance benefits under the California Unemployment Insurance Program. Appellees were given an eligibility interview at which the employer did not appear, although such an appearance was permitted. As a result of that interview both employees were ruled eligible for benefits. Payments began immediately. In each case the former employer filed an appeal after learning of the grant of benefits, contending that benefits should be denied because the claimants were discharged for cause. In accordance with the practice of the agency and pursuant to § 1335 of the

California Unemployment Insurance Code[1] payments automatically stopped. At the subsequent hearings before an Appeals Board Referee, which stage is essentially an appeal from the preliminary determination under California Unemployment Insurance Code §§ 1328, 1334, appellee Hudson's eligibility was affirmed, but appellee Java was ruled ineligible and the initial determination was reversed.

Prior to the hearings before the Referee, appellees commenced a class action in the United States District Court on behalf of themselves and other claimants similarly situated. They sought a declaration that § 1335 of the California Unemployment Insurance Code is unconstitutional and inconsistent with the requirements of § 303 (a)(1) of the Social Security Act, and an order enjoining the operation of § 1335.

A three-judge court was convened, and it concluded that § 1335 is defective on both constitutional and statutory grounds. The District Court held that by not providing for a pretermination hearing, the California procedure constitutes a denial of procedural due process,

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[1] Section 1335 of the California Unemployment Insurance Code provides:

"*If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision,* except that:

"(a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or

"(b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

"If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination." (Emphasis added.)

relying on *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). It further held that the application of § 1335, so as to result in a median seven-week delay in payments to claimants who have been found eligible for benefits, constituted a failure to pay unemployment compensation "when due" within the meaning of § 303 (a)(1) of the Social Security Act. The court granted appellees motion for a preliminary injunction, ordering the State of California not to suspend unemployment benefits pursuant to § 1335 because an eligibility determination has been appealed.

(1)

We agree with the conclusion of the District Court that § 1335 of the California Unemployment Insurance Code conflicts with the requirements of § 303 (a)(1) of the Social Security Act. This holding makes it unnecessary to reach the constitutional issue involved in *Goldberg* v. *Kelly*, *supra*, on which the District Court relied.

(2)

The importance of this case to workers is obvious. Because an understanding and the resolution of the basic issue depends on familiarity with a series of detailed procedures, we set out fully the administrative scheme.

All federal-state cooperative unemployment insurance programs are financed in part by grants from the United States pursuant to the Social Security Act, 42 U. S. C. §§ 501–503. No grant may be made to a State for a fiscal year unless the Secretary of Labor certifies the amount to be paid, 42 U. S. C. § 502 (a). The Secretary of Labor may not certify payment of federal funds unless he first finds that the State's program conforms to federal requirements. In particular, § 303 (a)(1) of the Act requires that state methods of administration be found

"to be reasonably calculated to insure full payment of unemployment compensation when due."[2]

The California Unemployment Insurance Compensation Program, certified by the Secretary of Labor under § 303 of the Act, provides for payment of insurance benefits, over an extended period of time, to persons who find themselves unemployed through no fault of their own. Cal. Unempl. Ins. Code §§ 1251 *et seq.* In order to be eligible for benefits a claimant is required to have earned a specified amount of wages during his base period. *Id.*, §1281. Benefits are paid from the State Unemployment Fund, which consists of funds collected from private employers, *id.*, §§ 976 *et seq.*, and money credited to the State's account in the federal Unemployment Trust Fund pursuant to 42 U. S. C. §§ 501–503, 1101–1105. The amount of money an employer is required to pay into the State Fund is based on benefits paid to terminated employees which are charged to its reserve account and disbursements from the State Unemployment Fund. Cal. Unempl. Ins. Code §§ 1025–1032, 976–978.

A claimant, appearing at an unemployment insurance office to assert a claim initially is asked to fill out forms

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[2] Section 303 (a)(1) of the Social Security Act, 42 U. S. C. § 503 (a)(1), provides in part:

"(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for:

"(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be *reasonably calculated to insure full payment of unemployment compensation when due;* . . . ." (Emphasis added.)

which, taken together, indicate the basis of the claim, the name of the claimant's previous employer, the reason for his unemployment, his work experience, etc. The claimant is asked to return to the office three weeks later for the purpose of receiving an Eligibility Benefits Rights Interview. The issue most frequently disputed, the claimant's reason for termination of employment, is answered on Form DE 1101, and the Department immediately sends copies of this form to the affected employer for verification. Meanwhile the employer is asked to furnish, within 10 days, "any facts then known which may affect the claimant's eligibility for benefits." Cal. Unempl. Ins. Code §§ 1327, 1030. If the employer challenges eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job. The interviewer has, according to the Local Office Manual (L. O. M.) used in California, the "responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility." L. O. M. § 1400.3 (2). "Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information." L. O. M. § 1400.5 (1)(a). This clearly contemplates inquiry to the latest employer, among others.

The claimant then appears for his interview. At the interview, the eligibility interviewer reviews available documents, makes certain that required forms have been completed, and clarifies or verifies any questionable statements. If there are inconsistent facts or questions as to eligibility, the claimant is asked to explain and offer his version of facts. The interviewer is instructed to make telephone contact with other parties, including the latest employer, at the time of the interview, if possible. L. O. M. § 1404.4 (20). Interested persons, including the employer, are allowed to confirm, contra-

dict, explain, or present any relevant evidence. L. O. M. § 1404.4 (21).

The eligibility interviewer must then consider all the evidence and make a determination as to eligibility. Normally, the determination is made at the conclusion of the interview. L. O. M. § 1404.6 (2). However, if necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days after the date of interview, or, if no response is received, no later than claimant's next report day. L. O. M. § 1400.3 (2) (a).

From the foregoing it can be seen that the interview for the determination of eligibility is the critical point in the California procedure.[3] In the Department's own terms, it is "the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that . . . [b]enefits *are paid promptly if a claimant is eligible.*" L. O. M. § 1400.1 (1) (emphasis added). If the initial determination is favorable to the claimant,[4] payments begin immediately, and for 95–98% of the claims, former employers do not appear or seek a hearing;[5] no further problem arises as to initial eligibility. The Department sends out a notice to the employer informing him that the claimant has been found eligible, and that the employer may appeal within 10 days. Cal. Unempl. Ins. Code § 1328. The 10-day period may be extended for "good cause." *Ibid.*

[3] Of the 226,066 claimants ruled ineligible in 1968, only 2,602 (1%) were found ineligible by a state referee upon an employer's appeal.

[4] Of 667,993 determinations on eligibility in 1968, 441,927 were favorable to the claimant.

[5] In 1968 there were 667,993 determinations on eligibility, 441,927 of which were favorable to claimants, but there were only 5,526 decisions on appeals filed by employers.

If the employer appeals, payment of the claimant's benefits is stopped pending determination on appeal before an Appeals Board Referee. *Id.*, § 1335; see L. O. M. § 1474. The automatic suspension of benefits upon the employer's appeal, after an initial determination of eligibility, is the aspect of the California procedure challenged here. By that time the claimant may have received one or perhaps two payments. When the employer appeals, a hearing is then scheduled at which both the parties may appear and be represented, call witnesses, and present evidence. "A referee, after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, or modify any determination which is appealed. . . ." Cal. Unempl. Ins. Code § 1334. The appeal affords a *de novo* consideration. Generally, processing of the employer's appeal takes between six and seven weeks, between the date of filing the appeal and the date of mailing the decision or dismissal.[6]

If upon appeal the Referee finds the claimant eligible, payments are reinstated at once and continue even if the employer exercises his right to appeal further to the Appeals Board. Cal. Unempl. Ins. Code § 1335 (b). Meanwhile as much as seven to 10 weeks may have elapsed. The record indicates that employers are successful in less than 50% of their appeals from initial determinations of eligibility.[7] The Referee's decision is final unless within 10 days further appeal is initiated

[6] In 1968 the period was 49 days; in 1969 it was 40.5 days.

[7] Of 4,159 appeals filed by an employer between January 1, 1969, and September 30, 1969, 2,023 resulted in decisions favorable to the employer. (During the same period there were 14,768 appeals filed by claimants, 4,838 of which were successful.) In 1968 there were 5,526 decisions on appeals filed by employers, resulting in 2,602 decisions favorable to the employer, and 2,924 favorable to the claimant.

to the Appeals Board. Cal. Unempl. Ins. Code §§ 1334, 1336. The Appeals Board must render a decision within 60 days after the filing of an appeal to it, unless it requires the taking of further evidence. *Id.*, § 1337. If the claimant is successful on appeal, he receives a lump sum payment for weeks of unemployment prior to the Referee's decision. *Id.*, § 1338. If the employer is successful on appeal, his reserve account is immediately credited with all monies that have been paid his former employee. He has no responsibility for recoupment. *Id.*, §§ 1335, 1380.[8]

(3)

The dispositive issue is the determination of whether § 1335 of the California Unemployment Insurance Code violates the command of 42 U. S. C. § 503 (a)(1) that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due." The purpose of the federal statutory scheme must be examined in order to reconcile the apparent conflict between the provision of the California statute and § 303 (a)(1) of the Social Security Act.

It is true, as appellants argue, that the unemployment compensation insurance program was not based on need in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago. A kind of "need" is present in the statutory scheme for insurance, however, to the extent that any "salary replacement" insurance fulfills a need caused by lost employment. The objective of Congress

[8] Counsel informed the Court that recoupment is effected by the Department as to approximately 65% of the amounts erroneously paid; this is generally accomplished by way of offset against benefits subsequently granted in a later unemployment claim. The Department may also file a civil action for recovery. See Cal. Unempl. Ins. Code § 2739.

was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish. The circumstances surrounding the enactment of the statute confirm this.

The Social Security Act received its impetus from the Report of the Committee on Economic Security,[9] which was established by executive order of President Franklin D. Roosevelt to study the whole problem of financial insecurity due to unemployment, old age, disability, and health. In its report, transmitted to Congress by the President on January 17, 1935, the Committee recommended a program of unemployment insurance compensation as a "first line defense . . . for . . . [a worker] ordinarily steadily employed . . . for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test. . . . It will carry workers over most, if not all, periods of unemployment in normal times without resort to any other form of assistance."[10] Estimates of possible amounts and duration of unemployment benefits were made by the actuarial staff of the Committee. On the basis of 1922–1933 statistics, it was estimated that 12 weeks of benefits could be paid

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[9] Report of the Committee on Economic Security, Hearings on S. 1130, Senate Committee on Finance, 74th Cong., 1st Sess., 1311 (1935); see generally Larson and Murray, The Development of Unemployment Insurance in the United States, 8 Vand. L. Rev. 181 (1955); Witte, Development of Unemployment Compensation, 55 Yale L. J. 21, 29–34 (1945).

[10] Report of the Committee on Economic Security, *supra*, n. 9, at 1321–1322. See Note, Charity versus Social Insurance in Unemployment Compensation Laws. 73 Yale L. J. 357 (1963).

with a two-week waiting period at a 4% employer contribution rate.[11] The longest waiting period entering into the estimates was four weeks, indicating an intent that payments should begin promptly after the expiration of a short waiting period.

Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that "when due" was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard. The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief."[12] Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend,"[13] serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for "security during the period following unemployment"[14] was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the Act "covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job."[15] Finally, Congress viewed un-

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[11] *Id.*, at 1321, 1319.

[12] H. R. Rep. No. 615, 74th Cong., 1st Sess., 7 (1935).

[13] Statement of the Secretary of Labor, S. Hearings, *supra*, n. 9, at 119. Cf. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 239 (1967).

[14] See S. Rep. No. 628, 74th Cong., 1st Sess., 12 (1935).

[15] Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H. R. 4120, House of Representatives, Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935).

employment insurance payments as a means of exerting an influence upon the stabilization of industry. "Their only distinguishing feature is that they will be specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used." [16] Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services. The following extract from the testimony of the Secretary of Labor, in support of the Act, describes the stabilization mechanism contemplated:

> "I think that the importance of providing purchasing power for these people, even though temporary, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment-insurance benefits in the hands of the people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device." [17]

We conclude that the word "due" in § 303 (a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment.

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[16] Statement of Senator Robert F. Wagner, S. Hearings, *supra*, n. 9, at 3.

[17] Statement of the Secretary of Labor, H. R. Hearings, *supra*, n. 15, at 182. See Clague, The Economics of Unemployment Compensation, 55 Yale L. J. 53, 69 (1945).

Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that the California procedure, which suspends payments for a median period of seven to 10 weeks pending appeal, after an initial determination of eligibility has been made, is not "reasonably calculated to insure full payment of unemployment compensation when due." [18]

(4)

We are not persuaded by appellants' suggestion that the initial determination is clouded with sufficient uncertainty as to warrant withholding benefits until the appeal is decided to protect the interests of the State or of employers. The California procedure for initial determinations is effective in insuring that benefits are limited to legally eligible claimants. Over 98% of ineligible claimants are screened out at this stage. The primary inquiry at the preliminary interview is to examine the claimant's basic eligibility under the California statute. It is an occasion when the claims of both the employer and the employee can be heard, however. The regulations contemplate that the interviewer shall make inquiries of the employer informally. This may not always flush out objections based on discharge for cause, as this case illustrates. Nonetheless if the employer has notice of the time and place of the preliminary interview, as was the case here, it is his responsibility to present sufficient data to make clear his objections to the claim for benefits and put the interviewer in a position to broaden the inquiry

[18] It was uncontested in argument before the District Court that the average period of unemployment in California is approximately nine weeks.

if necessary. Any procedure or regulation that fails to give notice to the employer would, of course, be violative of the statutory scheme as we construe it.

Although the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics and the minimum obligation of an employer is to inform the interviewer and the claimant of any disqualifying factors. So informed, the interviewer can direct the initial inquiry to identifying a frivolous or dilatory contention by either party.

It would frustrate one of the Act's basic purposes—providing a "substitute" for wages—to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a defense to the claim by way of appeal. If the employer fails to present any evidence, he has in effect defaulted, and neither he nor the State can with justification complain if, on a *prima facie* showing, benefits are allowed. If the employer's defenses are not accepted and the claim is allowed, that also constitutes a determination that the benefits are "due."

As we have noted, this construction of the statutory scheme vindicates the congressional objective; California's approach tends to frustrate it. Our reading of the statute imposes no hardship on either the State or the employer [19] and gives effect to the congressional objective of getting money into the pocket of the unemployed

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[19] For example, an employer's reserve account is not charged if a claimant is ruled ineligible because of voluntary termination or discharge for cause, unless the employer fails to furnish the information required. Cal. Unempl. Ins. Code §§ 1032, 1030.

In disposing of the prayer for a permanent injunction, it may be appropriate to join the Secretary of Labor as a party in order that complete relief may be accorded.

worker at the earliest point that is administratively feasible. That is what the Unemployment Insurance program was all about.

For the reasons stated enforcement of § 1335 must be enjoined because it is inconsistent with § 303 (a)(1) of the Social Security Act. See *King* v. *Smith*, 392 U. S. 309, 333 (1968); *Rosado* v. *Wyman*, 397 U. S. 397, 420-421 (1970).

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 507.—October Term, 1970

California Department of Human Resources Development et al., Appellants, v. Judith Java et al.	On Appeal From the United States District Court for the Northern District of California.

[April 26, 1971]

Mr. Justice Douglas, concurring.

While I agree with the opinion of the Court, I add a few words.

The argument of California in this case is surprisingly disingenuous. First it seeks to distinguish *Goldberg* v. *Kelly*, 397 U. S. 254, on the ground that "welfare is based on need; unemployment insurance is not." But that simply is not true, for the history makes clear that the thrust of the scheme for unemployment benefits was to take care of the need of displaced workers, pending a search for other employment. Second, California argues that delay in payment of benefits until the employer's appeal is ended is necessary in terms of due process because "it is the employer's money which is used to pay the claimant," his account being "charged" and his experience rating "adversely affected" each time an employee is paid benefits. It is true that the amount of taxes contributed by each employer to the unemployment fund varies directly with the number of his former employees who qualify for unemployment benefits. Under the California scheme, however, an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is *not* charged with any benefits paid to his former employee

pending his appeal. Calif. Unemp. Ins. Code §§ 1335, 1380. He has *no* responsibility for recoupment. Thus, regardless of whether benefits to his former employees are suspended pending his appeal, an employer is assured of a complete opportunity to be heard *before* effective action is taken against him.

Therefore here, as in *Goldberg*, the requirements of procedural due process protect the payment of benefits owing the displaced employee and the employer has notice and hearing before his account is charged.

Whether Due Process would require the latter is a question we do not reach.*

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*Cf. *Labor Board* v. *Gullett Gin Co.*, 340 U. S. 361. Though that case involved a question whether the Labor Board must deduct from back-pay awards unemployment insurance payments, we said:

"Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, *the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.*" *Id.*, 364. (Italics added.)